

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAIME HOYOS.

Petitioner.

V.

RON DAVIS, Warden of San Quentin
State Prison,

Respondent.

Case No.: 09cv0388 L (NLS)

DEATH PENALTY CASE

ORDER:

**(1) DENYING RESPONDENT'S
REQUEST TO DISMISS CLAIMS
14-16 ON THE BASIS OF STATE
PROCEDURAL BARS**

(2) DENYING PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING ON CLAIMS 13-23 AND 25

**(3) DENYING SECOND AMENDED
PETITION FOR A WRIT OF
HABEAS CORPUS**

On August 28, 2014, Petitioner filed a brief regarding procedural issues, including requesting an evidentiary hearing, and addressing the merits of the claims in the Second Amended Petition [“SAP”], the operative petition in this habeas action under 28 U.S.C. § 2254. (ECF No. 104.) Petitioner asserts that he “is entitled to an evidentiary hearing on

1 his Brady claims, his IAC [ineffective assistance of counsel] claims, and his Eighth
2 Amendment mental retardation claim," listed as Claims 13-23 and 25 of the SAP. (Id. at
3 55.) On October 23, 2014, Respondent filed an Opposition/Response, and on March 6,
4 2015, Petitioner filed a Reply. (ECF Nos. 106, 114.) The Court held oral arguments on
5 January 26, 2017. In response to the Court's subsequent request for information regarding
6 matters discussed at oral arguments (see ECF No. 120), Petitioner filed a Response on May
7 12, 2017 and a Notice of Lodgment on June 30, 2017. (ECF Nos. 135, 140.) On July 6,
8 2017, Respondent filed a Response to Petitioner's filings. (ECF No. 141.)

9 For the following reasons, and based on the arguments presented in the pleadings
10 and at oral argument, the Court **DENIES** Respondent's request to dismiss Claim 14-16 on
11 the basis of state procedural bars, **DENIES** Petitioner's request for an evidentiary hearing
12 on Claims 13-23 and 25, and **DENIES** habeas relief on all claims in the Second Amended
13 Petition.

14 **I. PROCEDURAL HISTORY**

15 By an Information filed on August 25, 1992, Petitioner Jaime Hoyos and co-
16 defendant Emilio Alvarado were charged with two counts of first degree murder and one
17 count of attempted first degree murder in the deaths of Daniel and Mary Magoon and the
18 wounding of their 3 year old son J., and three special circumstances. (Clerk's Transcript
19 ["CT"] 26-31.) Both Petitioner and Alvarado¹ were also charged with conspiracy to
20 commit robbery, first degree robbery, residential burglary, grand theft of a firearm, and
21 transporting more than 28.5 grams of marijuana. (CT 31-34.) Petitioner and Alvarado
22 were tried together.

23 After a guilt phase trial, Petitioner and Alvarado were convicted on two counts of
24 first degree murder pursuant to California Penal Code § 187 in the deaths of Daniel and
25

26
27 ¹ Alvarado alone was charged with three additional crimes, which included
28 possession of a firearm by possessor of controlled substance, possession of a controlled
substance, and possession of a firearm by a felon. (CT 34-35.)

1 Mary Magoon. (CT 3554-55, 3559-60.) They were acquitted of attempted murder but
2 convicted of the lesser included offense of assault with a firearm pursuant to Cal. Penal
3 Code §§ 664, 187, and 245 (a)(2) in the wounding of J. (CT 3556-57, 3561.) Petitioner
4 and Alvarado were also convicted of conspiracy to commit robbery pursuant to Cal. Penal
5 Code §§ 211 and 182.1, first degree robbery pursuant to Cal. Penal Code § 211, burglary
6 pursuant to Cal. Penal Code § 459, grand theft of a firearm pursuant to Cal. Penal Code
7 § 487.3, and transporting more than 28.5 grams of marijuana pursuant to California Health
8 and Safety Code § 11360(a). (CT 3554-64.)

9 The jury found that Petitioner and Alvarado used a firearm in the commission of the
10 murders pursuant to Cal. Penal Code § 12022.5. (CT 3555, 3559-60.) The jury also found
11 true the three special circumstance allegations- that the murder was committed during the
12 course of a robbery and burglary pursuant to Cal. Penal Code § 190.2(a)(17)(A) and (G),
13 and multiple murder pursuant to Cal. Penal Code § 190.2(a)(3). (CT 3555-56, 3559-60.)
14 Before the start of the penalty phase proceedings, the trial court denied Petitioner's motion
15 for a new trial, but granted Alvarado's.² (CT 3574-75.)

16 After the penalty phase, the jury returned a verdict of life without the possibility of
17 parole in the murder of Daniel Magoon and a verdict of death in the murder of Mary
18 Magoon. (CT 3583-84.) On July 11, 1994, the trial court denied Petitioner's motions for
19 a new trial and for modification of the verdict, and sentenced him to death. (CT 3588-91.)

20 On automatic appeal [“direct appeal”] of this conviction and judgment to the
21 California Supreme Court, Petitioner filed an opening brief on October 17, 2003, raising
22 sixteen (16) claims for relief, and a reply brief on March 16, 2006. (Lodgment Nos. 100,
23 102.) The California Supreme Court affirmed Petitioner's conviction and sentence in a
24 decision issued on July 23, 2007. People v. Hoyos, 41 Cal. 4th 872 (2007). On February
25
26

27
28 ² Alvarado later pled guilty and was sentenced to life in prison without the possibility
of parole.

1 19, 2008, the Supreme Court of the United States denied his petition for a writ of certiorari.
2 Hoyos v. California, 552 U.S. 1201 (2008.)

3 On September 11, 2006, Petitioner filed a habeas petition and supporting exhibits
4 with the California Supreme Court, raising eighteen (18) claims for relief, and a reply brief
5 on July 11, 2008. (Lodgment Nos. 106-15, 117.) The petition was denied on February 18,
6 2009, without an evidentiary hearing. (Lodgment No. 118.)

7 On February 26, 2009, Petitioner filed a motion to appoint counsel in this Court.
8 (ECF No. 1.) On October 2, 2009, the Court appointed counsel. (ECF No. 12.) On January
9 15, 2010, Petitioner filed a motion for equitable tolling. (ECF No. 30.) After briefing and
10 argument, the Court granted the motion for equitable tolling on February 16, 2010,
11 extending the deadline to file the petition until September 1, 2010. (ECF No. 36.) On
12 February 17, 2010, Petitioner filed a petition for writ of habeas corpus, raising twenty-eight
13 (28) claims for relief, and on September 1, 2010, Petitioner filed an amended petition for a
14 writ of habeas corpus, raising the same 28 claims. (ECF Nos. 37, 54.) After hearing and
15 adjudicating issues of exhaustion and stay and abeyance, the Court stayed the federal
16 petition and held the case in abeyance for purposes of exhaustion. (ECF No. 72.)

17 On February 3, 2011 and February 9, 2011, Petitioner filed a habeas petition and
18 supporting exhibits with the California Supreme Court, raising two claims for relief, and a
19 reply brief on May 25, 2011. (Lodgment Nos. 120-21, 123.) On October 30, 2013, the
20 California Supreme Court denied Petitioner's state exhaustion petition. (Lodgment No.
21 124.) On November 29, 2013, Petitioner filed his Second Amended Petition ["SAP"] in
22 this Court, raising the same 28 claims presented in the prior federal petitions. (ECF Nos.
23 86-88.) On March 25, 2014, Respondent filed an Amended Answer ["Ans."] and an
24 attached Memorandum of Points and Authorities ["Ans. Mem."]. (ECF No. 94.) On May
25 27, 2014, the Court issued an order setting forth deadlines for briefing procedural default,
26 merits and any motions for evidentiary development. (ECF No. 99.) On August 28, 2014,
27 Petitioner filed an Opening Brief ["Pet. Brief"] regarding the merits, procedural issues and
28 an evidentiary hearing. (ECF No. 104.) On October 23, 2014, Respondent filed an

1 Opposition/Response [“Resp. Opp.”], and on March 6, 2015, Petitioner filed a Reply
2 [“Reply”]. (ECF Nos. 106, 114.)

3 **II. TRIAL PROCEEDINGS**

4 The Court refers the parties to the statement of evidence issued by the California
5 Supreme Court in Hoyos, 41 Cal. 4th at 879-89. The California Supreme Court’s factual
6 findings are presumptively reasonable and entitled to deference in these proceedings. See
7 Sumner v. Mata, 449 U.S. 539, 545-47 (1981).

8 To provide context to the Court’s discussion of the claims in the Second Amended
9 Petition, particularly the claims asserting ineffective assistance of counsel, restated below
10 is the California Supreme Court’s summary of evidence and testimony presented during
11 the guilt and penalty phase proceedings.

12 **A. Guilt Phase**

13 *1. The Prosecution’s Case*

14 *a. Evening of May 26, 1992*

15 On May 26, 1992, Daniel Magoon, his wife Mary, and their children,
16 D. (age seven) and J. (age three), were living on Steele Canyon Road in the
17 Jamul area of San Diego County. Daniel Magoon operated a large-scale
18 marijuana distribution business out of the garage of their house. He also kept
19 weapons and money in the garage. A security gate around the house was
usually closed.

20 Jimmy Johnson was a long-time friend and occasional partner of Daniel
21 Magoon in the marijuana trade. In 1974, both Daniel Magoon and Johnson
22 had pleaded guilty to intent to distribute a controlled substance. Johnson
23 testified that he was not involved in dealing marijuana with Daniel Magoon
at the time of Magoon’s death.

24 Around 8:30 p.m., Daniel Magoon visited Johnson at Johnson’s
25 residence. Magoon told Johnson that he was expecting some people to come
26 over to the Magoon house that evening, and then left Johnson’s residence.
27 That day, Johnson had seen Magoon with a stack of money, possibly as much
as \$250,000. Johnson never heard from Daniel Magoon again.

28 Around 7:45 p.m., the Magoons’ next-door neighbor, Mary Jane Lange,

entered her bedroom to read. Her bedroom windows were open. About 40 minutes later, Lange heard Daniel Magoon's voice and at least one other male voice. She heard Magoon say something like, "Oh, come on." Sometime between 10:30 p.m. and 11:30 p.m., Mrs. Lange heard what sounded like four firecrackers, in rapid succession, that came from the direction of the Magoon residence. Between five and 15 minutes later, Mrs. Lange heard a series of four to seven more firecracker noises in rapid succession, again coming from the direction of the Magoon house. Mrs. Lange's live-in son-in-law, Kenneth Wall, heard what sounded like four gunshots sometime between 11:00 p.m. and 11:30 p.m.

b. Auto Stop and Arrest of Defendants

About 12:20 a.m., on May 27, 1992, El Cajon Police Officer William Pettus was on patrol when he noticed the rear license plate light was out on a passing Toyota Corolla. Officer Pettus stopped the Corolla, exited his patrol vehicle, and approached the car. He saw Alvarado in the driver's seat and defendant in the front passenger seat. Alvarado was shaking; he appeared nervous and was sweating, although the evening temperature was cool. Officer Pettus asked Alvarado for his driver's license and vehicle registration. Alvarado handed him a California Identification Card with the name "Ralph Varela." Alvarado told the officer that defendant had a driver's license, and the officer asked both Alvarado and defendant for defendant's license, but defendant did not produce one. After returning to his patrol car and determining that there was no record that either defendant or "Varela" had a valid driver's license, the officer began to write a citation and called for police back-up.

El Cajon Police Officer Christopher Pietrzak arrived at the scene shortly thereafter. Officer Pettus ordered defendant and Alvarado out of the car. Officer Pietrzak watched defendant and Alvarado, while Officer Pettus searched the Corolla. Officer Pettus searched the driver's side and found a nine-millimeter gun magazine (containing 12 rounds), and two large caliber rounds. On the passenger side, under the seat, he found a loaded nine-millimeter, semi-automatic, Egyptian-manufactured Helwan pistol. It had one round in the chamber and eight rounds in its magazine. The Helwan pistol matched a gun box later found in the victims' house for a gun that Daniel Magoon owned.

Officer Pettus then searched the back seat of the car, where he found phone bills, rental agency forms, and a license plate. He searched the trunk

1 and found approximately 28 pounds of marijuana, some of which was frozen,
2 both in brick form and inside plastic baggies contained in boxes. A latent
3 fingerprint removed from a piece of tape used to wrap the marijuana was later
4 identified as Daniel Magoon's.

5 Officer Pettus arrested Alvarado and defendant. The officer conducted
6 a pat-down search of Alvarado before placing him in a patrol car. He found
7 an empty nine-millimeter casing in Alvarado's left front pants pocket. After
8 placing Alvarado in a holding cell, the officer checked the back seat of the
9 patrol car and found two nine-millimeter cartridges. A strip search of
10 Alvarado yielded a rock of methamphetamine.

11 At the police station, Officer Pietrzak searched defendant and found
12 \$1,033 in various denominations in his right rear pants pocket, and three \$1
13 dollar bills in a front pocket. He also found defendant's Mexican driver's
14 license.

15 *c. Discovery of the Murders*

16 On May 27, 1992, about 7:00 a.m., seven-year-old D. woke up in his
17 home. He saw his three-year-old brother, J., sleeping on a futon in the living
18 room, woke him up, and asked him if he was okay. J. answered "yeah," and
19 fell back to sleep. D., however, saw some blood on J. He then found the body
20 of his mother, Mary Magoon, in the bathroom. He found his father's body in
21 the kitchen by the microwave. D. attempted to use the telephone to call 911
22 or the police, but was unsuccessful. He left to go to his best friend's house
23 down the street.

24 At approximately 7:30 a.m., Patricia Bagnell was jogging through a
25 field behind a 7-Eleven store in Jamul. She encountered D., barefoot, walking
26 quickly down the side of a dirt road. D. looked pale and was crying. She said
hello, and asked him why he was crying. He said that his parents were dead
and there was a lot of blood in his house. She walked with him towards the
residence of his best friend, where they encountered Richard Brewer. Brewer
asked if they needed help. Bagnell told Brewer that D. had told her that his
parents were dead. Brewer asked D. where he lived, and the three of them
drove to D.'s house. When they arrived at the Magoon residence, both security
gates were open and they pulled into the driveway.

27 The front door was open, and Brewer entered the residence while the
28 other two stayed in his truck. The house was a shambles; everything was torn

1 up. Brewer saw a little boy on the living room floor close to two rifles and a
2 gun with a silencer. Brewer shook the little boy but got no response. Brewer
3 got nervous and left to call for help, leaving the little boy where he was.
Brewer, D., and Bagnell went to Bagnell's house nearby and called 911.

4 Firefighters arrived at the Magoon residence about 8:00 a.m. Brewer
5 told Fire Captain Jeffrey Nelson that there was a bleeding child in the living
6 room, and that there might be more people down the hallway. After making
7 sure that police deputies were on their way, Captain Nelson entered the house
8 through the front door. He noticed a "Mac-10" style submachine gun on the
9 carpet just beyond the entry tile, later identified as an Ingram, semiautomatic
10 .45-caliber pistol with a barrel extension. As he walked into the entryway, he
11 saw J. lying on a futon. As he moved toward the child, he saw two rifles that
12 were lying parallel to each other, later identified as a Ruger Mini-14 semi-
13 automatic .223-caliber rifle, and a .177-caliber air rifle.

14 J.'s hair was matted and wet from blood. The upper part of his T-shirt
15 was covered with blood, which had spilled down onto his diaper. When
16 Captain Nelson attempted to feel for a pulse, J. woke up and looked very
17 scared. Captain Nelson then carried him outside to receive medical attention.
18 J. had a laceration to the back of his head, and a six-to-eight-inch-long bruise
19 in the left shoulder blade area. His head laceration was later determined to be
20 a bullet wound.

21 Police deputies and other investigators went through the house. Daniel
22 Magoon was found dead, lying on the floor in the kitchen area. Mary Magoon
23 was also found dead, lying on her right side with her shoulder and head at the
24 threshold of the hallway bathroom doorway. There was no evidence of forced
25 entry to the Magoon residence.

26 *d. Crime Scene Evidence*

27 On-site investigation and later testing showed that multiple weapons
28 had been fired in various rooms of the house, and that the house had been
ransacked. No percipient witnesses testified about what happened in the house
when the Magoons were shot. The prosecution relied on detailed crime scene
evidence to establish its case.

29 *(1) Entryway and Living Room*

30 Investigators found three guns in the entryway and living room: a .45-caliber

1 semiautomatic pistol, a semiautomatic .233-caliber rifle, and a .177-caliber
2 air rifle. The Ingram, Mac 10-style .45-caliber semiautomatic pistol found at
3 the entryway had a barrel extension (that resembled a silencer) and a
4 magazine, but contained no ammunition. It had been improperly reassembled,
5 and therefore could not fire. The Ruger Mini-14 semiautomatic .223-caliber
6 rifle did not have a magazine, and had no rounds in the chamber. It had been
7 fired before, but the testifying criminologist could not determine how
8 recently. Blood on the trigger guard was tested and found to be consistent with
9 defendant's blood type. The .177-caliber air rifle was operable and had been
10 fired before, but it could not be determined how recently. Its barrel was bent
in a downward direction, and had hair and blood on it. Blood on the trigger
guard and forearm stock was tested and found to be consistent with
defendant's blood. Blood on the barrel was consistent with Mary Magoon's
blood.

11 On the floor was a woman's checkbook and wallet that had been rifled
12 through, but contained a few dollars. There was also loose marijuana on the
13 floor. One unexpended nine-millimeter cartridge was on the living room floor
next to the fireplace.

14 (2) *Kitchen*

15 On top of the kitchen island, investigators found a full 7-Eleven "Big
16 Gulp" cup with Alvarado's fingerprints.^{FN4} Daniel Magoon's face and upper
17 body were covered with a blanket. His right hand held a clump of hair, later
18 identified as J.'s. There were several nine-millimeter and .22-caliber casings
19 on the floor near Daniel Magoon's body, and scattered across the kitchen
20 counter area. A wallet containing Daniel Magoon's driver's license, business
and credit cards, but no money, was on the floor.

21 FN4. Marbell Lopez testified that there was a 7-Eleven store near the
22 Magoon residence, and that she had driven defendant home from that 7-
23 Eleven store at least once two months before the murders.

24 (3) *Hallway Bathroom*

25 One expended nine-millimeter bullet was found under Mary Magoon's
26 right forearm. A second nine-millimeter bullet fell from her body as she was
27 lifted onto a gurney. She held a clump of hair in her right hand, later identified
28 as her own. She also held a clump of hair in her left hand, later identified as
J.'s, and a baby pacifier. A baby blanket was lying between her legs. She was

1 wearing pajamas.

2 There were three nine-millimeter casings in the hallway bathroom. The
3 hallway bathroom door had two bullet holes at the base. The door had another
4 bullet hole, and a blood spatter about five and one-half feet off the ground,
5 which was consistent with either blunt force trauma or a gunshot. The blood
6 on the bathroom door was consistent with that of Mary Magoon's blood.

7 The hallway carpet contained a bullet hole. A nine-millimeter casing
8 was lying on the same carpet. There was blood on the wall across from the
9 bathroom hallway about two and one-half feet off the ground, which was
10 identified as a swiped application of blood onto the surface. This blood was
11 consistent with the blood of either Daniel Magoon or J. There was fresh vomit
12 on the hallway carpet located between where Mary Magoon's body was found
13 and the kitchen.

14 (4) *Master Bedroom*

15 Investigators found a nine-millimeter casing on the carpet at the end of
16 the hallway or entrance to the master bedroom. The master bedroom door was
17 open. The outside of the door had a bullet hole about three feet up from the
18 floor with some black soot around it, indicating a close-range shot. Splinters
19 from the door were lying on the floor in that area. A nine-millimeter casing
20 was on a closet floor. An expended bullet that struck a chair was lying on the
21 floor near a gun safe. The gun safe had a combination lock and keys, both of
22 which had to be activated to open the safe door. Some keys were in the lock,
23 but the safe door was closed and locked.

24 In the master bedroom bathroom there was a hidden storage
25 compartment behind a slip-out shelf. This storage compartment contained a
26 .30-caliber M-1 rifle. It also contained the gun box for the nine-millimeter
27 Helwan pistol that Daniel Magoon owned.

28 (5) *Two Bedrooms off the Hallway*

29 The Magoon residence had two bedrooms off the hallway. The door to
30 one of the bedrooms appeared to have been recently kicked open. The
31 doorjamb was cracked and splintered, and the striker plate and splinters were
32 lying on the hallway carpet.

1
2 (6) *Garage*

3 The garage contained marijuana debris, heat lamps, a fan, a trash
4 compactor with wood blocks to make bricks of marijuana, an electronic scale,
5 a vacuum sealer, and packaging material, such as plastic baggies, large
6 garbage and plastic bags, and rolls of clear tape. A federal drug enforcement
7 agent testifying as an expert witness stated that the equipment indicated that
8 the persons in control of the premises were involved in the sale of marijuana,
9 and that the type of marijuana and its packaging indicated Mexican origin.
10 Also in the garage were two freezers, a chest-type and an upright-type.^{FN5}
11 Only the upright-type freezer was working, and it contained two packages
12 with large quantities of marijuana stems and seeds, as well a large amount of
13 marijuana debris at the bottom of the freezer. A roll-away tool chest contained
14 "pay and owe" sheets, which are used to record drug transactions.

15 FN5. The federal drug enforcement agent testified that
16 marijuana dealers believe that storing marijuana in a freezer
17 retains its potency.

18 *e. Autopsy and Medical Evidence*

19 (1) *Daniel Magoon*

20 Daniel Magoon died from four gunshot wounds. A bullet hole on his
21 left sleeve was surrounded by tiny marks from burning gunpowder, indicating
22 the shot came from an "intermediate" range of a few inches to a few feet. The
23 four shots probably were fired in rapid succession. It was unlikely he would
24 have been able to walk after being shot because both of his lungs and his aorta
25 had been perforated, and a bullet had penetrated his spinal cord; he probably
26 died within 30 seconds of being shot. The toxicology report on Daniel
27 Magoon showed 0.25 micrograms per milliliter of active cocaine present in
28 his blood.

29 (2) *Mary Magoon*

30 Mary Magoon's death was caused by gunshot wounds and blunt force
31 injuries. She suffered four gunshot wounds, including one from a bullet that
32 entered the back of her head, went through her brain, and exited her right
33 forehead. In addition, the medical examiner identified at least seven separate
34 blunt force injuries to her head. The severe injuries to her head alone could

1 have caused her death. Her skull was severely fractured underneath the bruises
2 and lacerations. The blunt force injuries to her head occurred before she died.
3 These injuries could have been caused by the air rifle found on the living room
floor.

4 Mary Magoon also had injuries to the rest of her body, including four
5 separate injuries to her back. These injuries had imprints that were consistent
6 with the shape of the air rifle. She had multiple injuries to her arms and hands.
7 Her left ring finger was broken, and there were shallow cuts to her right wrist.
8 Some of these injuries were consistent with “defensive wounds,” which is a
9 natural inclination to move the arms up to deflect blows. A laceration on the
10 top of her foot contained embedded wood fragments, which the medical
11 examiner opined were from the wood chips the gunshot hole created in the
lower part of the hallway bathroom door. The toxicology report on Mary
Magoon showed 0.98 micrograms per milliliter of active cocaine present in
her blood.

12 (3) J.

13 J. had two lacerations, an entry wound and an exit wound two inches
14 apart, to the back of his head, indicating a bullet caused the penetrating injury.
15 There was discoloration and burning of the skin which, the treating physician
16 opined, indicated the gun was close to the entry wound. A brain scan indicated
17 the brain had been injured, but J.’s wound was not life-threatening. An impact
to the brain can cause nausea and vomiting.

18 *f. Blood and DNA Testing*

19 Defendant’s and Alvarado’s clothing was taken as evidence the night
20 they were arrested and later submitted for DNA testing, which revealed the
21 following. Defendant was the possible source of the bloodstains on his T-shirt
22 and of three separate bloodstains on his jeans. However, there was blood
23 consistent with that of Mary Magoon on the right thigh of defendant’s jeans.
24 There was also blood consistent with that of either Daniel Magoon or J. on the
left front pocket area of defendant’s jeans. No blood was found on Alvarado’s
clothing.

25 *g. Ballistic Evidence*

26 A firearms expert testified that his analysis of the recovered bullets and
27 casings indicated that two nine-millimeter firearms were used at the crime
28

1 scene. Daniel Magoon's Helwan pistol, which was found in Alvarado's car,
2 was the only nine-millimeter weapon recovered during the investigation, but
3 none of the recovered nine-millimeter bullets or casings was fired by the
4 Helwan. The Helwan had been fired at some point, but it was not possible to
determine when.

5 Expert testimony also revealed that two expended bullets recovered
6 from Daniel Magoon's body during the autopsy, and the expended bullet
7 found on the master bedroom floor, were fired by one nine-millimeter
8 weapon, but the expert could not determine the particular model. Either of the
9 two nine-millimeter guns listed on the Department of Justice's records as
10 registered to Alvarado (under the name "Ralph Varela") was the type of gun
11 that could have fired the bullets, but there were approximately 75 other models
12 of nine-millimeter firearms available on the market that could have also fired
13 them.

14 The two expended bullets recovered under Mary Magoon's body were
15 fired from the same gun, which was probably an Uzi-manufactured firearm.
16 The Uzi magazine found in Alvarado's car could have fit into either a pistol
17 or carbine Uzi weapon.

18 The firearms expert also testified that six of the nine-millimeter casings
19 recovered were fired by one gun; five of the casings were found at the crime
20 scene (including the three casings found near Daniel Magoon's body) and one
21 casing was found in Alvarado's pants pocket when he was arrested. The three
22 nine-millimeter casings found on the floor in the hallway bathroom (where
23 Mary Magoon was killed) were fired from a different gun.

24 An unexpended cartridge found on the living room floor, and two
25 unexpended cartridges found in the backseat of the patrol car where Alvarado
26 was sitting, had been cycled through the same firearm that fired the three nine-
27 millimeter casings found on the hallway bathroom floor. In addition, five .22-
28 caliber casings were recovered at the crime scene, all of which were fired from
the same gun.

29 *h. Defendant's Dealings With Daniel Magoon*

30 Several times between February and May of 1992, Johnson was present
31 at the Magoon residence, mostly in the garage, where Daniel Magoon, who
32 knew some Spanish, spoke with Spanish-speaking men. Johnson identified
33 defendant at trial as someone he had seen with Daniel Magoon at least once

1 in the garage. Defendant had been at the garage in the company of one or two
2 other persons. Johnson did not recognize Alvarado. Defendant had also been
3 in the company of a woman named "Maria" Lopez.^{FN6} Johnson initially
4 thought Maria Lopez and defendant were married, and assumed defendant's
5 name was "Jaime Lopez." Johnson had identified defendant in a live line-up
6 as "Jamie Lopez."

7 FN6. Maria Lopez was apparently a friend of Johnson's
8 wife. Lopez appears to be the same person as "Marbell" Lopez,
9 who testified at trial.

10 Marbell Lopez met defendant in 1991, and had a close relationship with
11 him. In February 1992, she purchased a Ford Bronco for defendant with
12 money he gave her. She would occasionally drive defendant to the Magoon
13 residence, had been there with him four or five times, and had met Daniel
14 Magoon there once or twice while with defendant. She also met Alvarado
15 through defendant.

16 *i. Alvarado's Firearms Use*

17 Thomas Lamb, who knew Alvarado, testified at trial. He stated that
18 once, before the murders, Alvarado had displayed a nine-millimeter handgun
19 to him.

20 Earlier on the day the murders were committed, about 3:00 p.m.,
21 defendant, Alvarado, Thomas Arroyo, and Jose "Chepe" Sanabia drove to a
22 gun shop in San Ysidro, California.^{FN7} Alvarado, using the name "Ralph
23 Varela," purchased a Bersa, a .380-caliber gun manufactured in Argentina,
24 which is smaller than a nine-millimeter gun and is called a "nine-millimeter
25 short." Alvarado did not take the gun with him that day, because there was a
26 15-day waiting period. Sanabia picked up the gun after the waiting period.

27 FN7. Sanabia identified defendant in a photographic
28 lineup but could not identify defendant in court.

29 On May 30, 1992, a detective searched Alvarado's residence in El
30 Cajon. Underneath a drawer, the detective found an empty gun box for a
31 semiautomatic nine-millimeter pistol. The serial number on the gun box
32 matched the serial number of a weapon listed on the Department of Justice's
33 records sold to "Ralph Varela" (Alvarado's alias).

1 2. *The Defense Case*

2 Neither codefendant testified.

3 4. *a. Defendant's Driver's License*

5 An official from the Mexican consulate testified that defendant had a
6 valid Mexican truck driver's license.

7 8. *b. Daniel Magoon's Cocaine Use*

9 As noted, toxicological specimens collected during the autopsy
10 indicated that Daniel Magoon had 0.25 micrograms per milliliter of active
11 cocaine in his blood. Stephen Stahl, M.D., a psychiatrist and
12 psychopharmacologist, testified that this level of cocaine would be consistent
13 with Daniel Magoon's "being anywhere from mildly stimulated to being
14 overtly crazy." Richard Whalley, a forensic scientist and toxicologist, testified
15 that, given this cocaine level, Daniel Magoon could have exhibited a range of
16 behavior, from being a little more than usually alert to paranoia.

17 9. *c. Daniel Magoon's Firearms Use*

18 10. Arthur Coleman testified that on April 25, 1982, he was a deputy sheriff
19 11. in Imperial County, and he encountered Daniel Magoon driving a van.
20 12. Magoon appeared to be under the influence of alcohol, and Deputy Coleman
21 13. arrested him. During an inventory search of the van, Deputy Coleman
22 14. retrieved three loaded firearms, two unloaded firearms, approximately 1,000
23 15. rounds of ammunition, and two bundles of marijuana.

24 16. *d. The Shooting of J.*

25 17. Pathologist Arthur Koehler, M.D., testified that he had reviewed the
26 18. medical reports, photographs, and other records of J.'s gunshot wounds. Dr.
27 19. Koehler testified that the bullet entry to J.'s scalp was "tangential," which
28 20. meant that it was fired somewhat parallel to his scalp rather than at a right
21 22. angle. Dr. Koehler stated that J.'s wound was consistent with a bullet passing
22 23. through Mary Magoon's arm.

23 24. Forensic pathologist, Irving Root, M.D., also testified about J.'s
24 25. injuries. Dr. Root stated that, if J. had been injured in the area of the hallway
25 26. bathroom, one would expect to see a blood trail from that area to the futon

1 where J. was found, but there appeared to be no such blood trail. Because of
2 this, and because of the large amount of blood on the futon, it was Dr. Root's
3 opinion that J. was on the futon within a few seconds to one minute after he
4 began to bleed. Dr. Root testified that the vomit found on the hallway floor
was consistent with J.'s vomiting after he sustained the scalp injury.

5 **B. Penalty Phase**

6 ***1. Prosecution Evidence***

7 The prosecution gave no opening statement, put on no evidence, and
8 rested on the guilt phase evidence.

9 ***2. Defense Evidence***

10 James Park, a correctional consultant and retired administrator for the
11 California Department of Corrections, testified about the conditions of
12 defendant's confinement, if he were sentenced to life without the possibility
13 of parole.

14 Carrie Baker, who lived in Jamul, testified that, in the early morning of
15 May 27, 1992, she heard approximately five muffled gunshots around 2:45
16 a.m. (which would have been after the time defendants had been arrested).
17 Three or four days later, she read something about the murders, called a
18 number that was listed for information about the case, and left her name and
telephone number on an answering machine.

19 Eight members of defendant's family (his wife, three children, three
20 brothers, and a sister) testified that they loved defendant and would be deeply
21 saddened if he were put to death.

22 Hoyos, 41 Cal. 4th at 879-89.

23 **III. PROCEDURAL MATTERS**

24 **A. Procedural Default**

25 When a state court's rejection of a federal claim "rests on a state law ground that is
26 independent of the federal question and adequate to support the judgment," the claim is
27 procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 729 (1991). "State rules
28 count as 'adequate' if they are 'firmly established and regularly followed.'" Johnson v.

1 Lee, 578 U.S. ___, 136 S.Ct. 1802, 1804 (2016), quoting Walker v. Martin, 562 U.S. 307,
2 316 (2011). “For a state procedural rule to be ‘independent,’ the state law basis for the
3 decision must not be interwoven with federal law.” La Crosse v. Kernan, 244 F.3d 702,
4 704 (9th Cir. 2001), citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) and Harris
5 v. Reed, 489 U.S. 255, 265 (1989). “In all cases in which a state prisoner has defaulted his
6 federal claims in state court pursuant to an independent and adequate state procedural rule,
7 federal habeas review of the claims is barred unless the prisoner can demonstrate cause for
8 the default and actual prejudice as a result of the alleged violation of federal law, or
9 demonstrate that failure to consider the claims will result in a fundamental miscarriage of
10 justice.” Coleman, 501 U.S. at 750.

11 Respondent asserts that the Court should not review the portion of Claim 14 alleging
12 ineffective assistance of counsel with respect to the third party culpability defense because
13 the claim is procedurally barred as untimely. (Ans. at 11-12.) Respondent also asserts that
14 Claims 15 and 16 are procedurally barred under Dixon and Seaton, respectively, and should
15 not be reviewed on the merits. (Ans. at 13-14.)

16 In denying the first state habeas petition, the California Supreme Court held that
17 “[e]xcept insofar as it asserts ineffective assistance of trial counsel,” the state claim now
18 raised as Claim 15 in the SAP “is barred under *In re Dixon* (1953) 41 Cal.2d 756, 759,
19 because it could have been, but was not, raised on appeal.” (Lodgment No. 118.) The
20 California Supreme Court held that “[e]xcept insofar as it asserts ineffective assistance of
21 trial counsel,” the state claim now raised as Claim 16 in the SAP “is barred under *In re*
22 *Seaton* (2004) 34 Cal.4th 193, 199-200, because it was not properly preserved in the trial
23 court.” (Id.) The California Supreme Court also summarily stated: “All claims are denied
24 on the merits.” (Id.) With respect to the second state petition, the California Supreme
25 Court denied the ineffective assistance of counsel portion of the state claim now raised as
26 Claim 14 on the merits and stated that the claim “is also barred as untimely (*In re Robbins*
27 (1998) 18 Cal.4th 770, 780-81) and because it could have been, but was not, raised in
28 petitioner’s first petition for writ of habeas corpus. (*In re Clark* (1993) 5 Cal.4th 750, 767-

1 769.)” (Lodgment No. 124.)

2 Petitioner argues that he can satisfy cause and prejudice with respect to Claim 14,
3 and can also demonstrate that Claim 14 should be heard on the merits under the miscarriage
4 of justice exception. (Pet. Brief at 29-32.) Petitioner points out that the California Supreme
5 Court explicitly exempted the ineffective assistance of counsel allegations in Claims 15
6 and 16 from procedural bars in ruling on those claims, and alleges that with respect to
7 Claim 15 “[r]egardless of whether a separate claim for prosecutorial misconduct as to the
8 initial making of this statement is viable in this federal proceeding, the IAC component of
9 the claim clearly is,” and asserts with respect to Claim 16 that “[t]he crux of petitioner’s
10 claim is ineffective assistance of counsel.” (*Id.* at 36, 38.)

11 The Ninth Circuit has held that: “Procedural bar issues are not infrequently more
12 complex than the merits issues presented by the appeal, so it may well make sense in some
13 instances to proceed to the merits if the result will be the same.” *Franklin v. Johnson*, 290
14 F.3d 1223, 1232 (9th Cir. 2002), citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)
15 (“We do not mean to suggest that the procedural-bar issue must invariably be resolved first;
16 only that it ordinarily should be.”) In light of the acknowledged complexities involved in
17 a prospective procedural default analysis, coupled with the fact that these three claims each
18 fail on the merits, as discussed in detail below, the Court will address Claims 14, 15 and
19 16 on the merits and decline to address the issue of procedural default.

20 **B. Teague v. Lane**

21 “Unless they fall within an exception to the general rule, new constitutional rules of
22 criminal procedure will not be applicable to those cases which have become final before
23 the new rules are announced.” *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality
24 opinion); *see also Stringer v. Black*, 503 U.S. 222, 227 (1992) (“Subject to two exceptions,
25 a case decided after a petitioner’s conviction and sentence became final may not be the
26 predicate for federal habeas corpus relief unless the decision was dictated by precedent
27 existing when the judgment in question became final.”) A new rule is one that “breaks
28 new ground or imposes a new obligation on the States or the Federal Government” or one

whose “result was not dictated by precedent existing at the time defendant’s conviction became final.” Teague, 489 U.S. at 301. The two exceptions to Teague are if the new rule in question: (1) “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’” or (2) “requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’” Id. at 307, quoting Mackey v. United States, 401 U.S. 667, 692, 693 (1971) (internal quotation omitted). “That a new procedural rule is ‘fundamental’ in some abstract sense is not enough; the rule must be one ‘without which the likelihood of an accurate conviction is seriously diminished.’” Schriro v. Summerlin, 542 U.S. 348, 352 (2004), quoting Teague, 489 U.S. at 313. “[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply Teague v. Lane before considering the merits of the claim.” Caspari v. Bohlen, 510 U.S. 383, 389 (1994). Respondent has raised Teague as a defense with respect to Claims 4 and 12. (See Ans. Mem. at 22-24, Resp. Opp. at 33 (Claim 4); Resp. Opp. at 53 (Claim 12).)

For the purposes of the Teague analysis, the Court again notes that the California Supreme Court affirmed Petitioner’s conviction and sentence in a decision issued on July 23, 2007. On February 19, 2008, the Supreme Court of the United States denied his petition for a writ of certiorari, at which time Petitioner’s conviction became final.

1. Claim 4

In this claim, Petitioner contends that the trial court erred in denying a defense motion to conduct individual, sequestered voir dire, specifically with respect to the prospective jurors’ responses concerning the death penalty. (SAP at 32.) Respondent argues that “Hoyos’ speculation that the trial court’s refusal to conduct individual and sequestered voir dire ‘resulted in a significant risk that the resulting *voir dire* was inadequate “to identify unqualified jurors[”]’ (SAP at 34) indeed ‘breaks new ground or imposes a new obligation on the State or the Federal government,’” and does not fit under either Teague exception. (Resp. Opp. at 13-14.) Petitioner maintains that he “seeks only the application of the well-settled rule that a voir dire procedure that ‘render(s) the

1 defendant's trial fundamentally unfair,' violates the United States Constitution, Mu'Min
2 [v. Virginia, 500 U.S. 415 (1991)], *supra*." (Pet. Brief at 9-10.)

3 However, upon review, it is clear that in Mu'Min, the very case Petitioner relies
4 upon, the Supreme Court rejected a claim of error arising from a trial court's refusal to
5 conduct individual voir dire to question prospective jurors on the specific content of their
6 exposure to pretrial publicity. See id. at 427 ("[O]ur own cases have stressed the wide
7 discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity
8 and in other areas of inquiry that might tend to show juror bias.")

9 As such, Petitioner's citation to Mu'Min fails to support his contention that the rule
10 he seeks is compelled by existing Supreme Court precedent. Such a rule would "break[]
11 new ground or impose[] a new obligation on the States or the Federal Government," and
12 Petitioner fails to show that either exception to Teague applies to this "new" rule. Id. at
13 301, 307. The rule proposed in Claim 4 is Teague-barred. In any event, as an alternate
14 ground for the decision, the Court finds that Claim 4 also fails on the merits for the reasons
15 discussed below.

16 **2. Claim 12**

17 In this Claim, Petitioner contends that he, as a Mexican national, was deprived of
18 due process by the violation of his right to consular access and notification pursuant to
19 Article 36 of the Vienna Convention. (SAP at 56-57.) Respondent asserts that "Hoyos has
20 not presented any case law indicating that reversal of his conviction and sentence because
21 of a violation of Article 36 of the Vienna Convention is compelled by existing Supreme
22 Court precedent," and argues that such a rule would be barred under Teague. (Ans. Mem.
23 at 53; Resp. Opp. at 34.)

24 In Breard v. Greene, 523 U.S. 371 (1998), the Supreme Court suggested generally
25 that "[a]ny rights that the Consul General might have by virtue of the Vienna Convention
26 exist for the benefit of [the foreign country], not for him as an individual." Id. at 378. In
27 2008, meanwhile, the Supreme Court acknowledged the lack of resolution on this issue and
28 expressed skepticism that any such individual rights, even if granted, would be enforceable

1 on federal habeas review. See Medellin v. Dretke, 544 U.S. 660, 664 (2005) (“[E]ven
2 accepting, *arguendo*, the ICJ’s construction of the Vienna Convention’s consular access
3 provisions [determining, among other issues, that it guaranteed individually enforceable
4 rights], a violation of those provisions may not be cognizable in a federal habeas
5 proceeding.”) Both parties also acknowledge the Supreme Court’s decision in Garcia v.
6 Texas, 564 U.S. 940 (2011) (per curiam), in which the Court reasserted Medellin’s holding
7 that “[n]either the Avena decision nor the President’s Memorandum purporting to
8 implement that decision constituted directly enforceable federal law.” Garcia, 564 U.S. at
9 941.

10 Thus, given the absence of clearly established federal law dictating that the Vienna
11 Convention creates individually enforceable rights, much less ones that are cognizable on
12 federal habeas review, it is clear that the rule Petitioner advances would “break[] new
13 ground or impose[] a new obligation on the States or the Federal Government.” Teague,
14 489 U.S. at 301. There is also no indication that such a rule would fall under either
15 exception to Teague. See id. at 307. Accordingly, Claim 12 is barred under Teague, and
16 in any event also fails on the merits as discussed below.

17 **IV. STANDARDS OF REVIEW**

18 **A. Standard of Merits Review under AEDPA**

19 The provisions of the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”]
20 apply to federal habeas petitions filed after its effective date of April 24, 1996. See Lindh
21 v. Murphy, 521 U.S. 320, 336 (1997); Woodford v. Garceau, 538 U.S. 202, 207 (2003).
22 Because Petitioner filed his federal petition in this Court after that date, AEDPA applies to
23 this case.

24 Pursuant to AEDPA, a state prisoner is not entitled to federal habeas relief on a claim
25 that the state court adjudicated on the merits unless that ruling: “(1) resulted in a decision
26 that was contrary to, or involved an unreasonable application of, clearly established Federal
27 law, as determined by the Supreme Court of the United States,” or “(2) resulted in a
28 decision that was based on an unreasonable determination of the facts in light of the

1 evidence presented in the State court proceeding.” Harrington v. Richter, 562 U.S. 86, 97-
2 98 (2011), quoting 28 U.S.C. § 2254(d)(1)-(2).

3 A decision is “contrary to” clearly established law if “the state court arrives at a
4 conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
5 state court decides a case differently than [the Supreme] Court has on a set of materially
6 indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 413 (2000). A decision
7 involves an “unreasonable application” of clearly established federal law if “the state court
8 identifies the correct governing legal principle . . . but unreasonably applies that principle
9 to the facts of the prisoner’s case.” Id.; Bruce v. Terhune, 376 F.3d 950, 953 (9th Cir.
10 2004). “Section 2254(d)(1)’s ‘clearly established’ phrase ‘refers to the holdings, as
11 opposed to the dicta, of [the Supreme] Court’s decisions at the time of the relevant state-
12 court decision.’” Lockyer v. Andrade, 538 U.S. 63, 71 (2003), quoting Williams, 529 U.S.
13 at 412.

14 “[C]ircuit precedent does not constitute ‘clearly established’ Federal law, as
15 determined by the Supreme Court,’ 28 U.S.C. 2254(d)(1). It therefore cannot form the
16 basis for habeas relief under AEDPA.” Parker v. Matthews, 567 U.S. 37, 48-49 (2012).
17 However, “circuit court precedent may be persuasive in determining what law is clearly
18 established and whether a state court applied that law unreasonably.” Stanley v. Cullen,
19 633 F.3d 852, 859 (9th Cir. 2011), quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir.
20 2010); see also Marshall v. Rodgers, 569 U.S. 58, __, 133 S.Ct. 1446, 1450-51 (2013) (per
21 curiam) (while a reviewing court may “look to circuit precedent to ascertain whether it has
22 already held that the particular point in issue is clearly established by Supreme Court
23 precedent, . . . it may not canvass circuit decisions to determine whether a particular rule
24 of law is so widely accepted among Federal Circuits that it would, if presented to [the
25 Supreme] Court, be accepted as correct.”) (internal citations and quotations omitted).

26 “The question under AEDPA is not whether a federal court believes the state court’s
27 determination was incorrect but whether that determination was unreasonable— a
28 substantially higher threshold.” Schriro v. Landrigan, 550 U.S. 465, 473 (2007), citing

1 Williams, 529 U.S. at 410. “State-court factual findings, moreover, are presumed correct;
2 the petitioner has the burden of rebutting the presumption by ‘clear and convincing
3 evidence.’” Rice v. Collins, 546 U.S. 333, 338-39 (2006), quoting 28 U.S.C. § 2254(e)(1).

4 “A state court’s determination that a claim lacks merit precludes federal habeas
5 relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s
6 decision.” Richter, 562 U.S. at 101, quoting Yarborough v. Alvarado, 541 U.S. 652, 664
7 (2004). “If this standard is difficult to meet, that is because it was meant to be. As amended
8 by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation
9 of claims already rejected in state proceedings. . . . It preserves authority to issue the writ
10 in cases where there is no possibility fairminded jurists could disagree that the state court’s
11 decision conflicts with [the Supreme] Court’s precedents.” Richter, 562 U.S. at 102.

12 Claims 12, a portion of Claim 14 (the portion not involving allegations of ineffective
13 assistance of counsel), 15-23,³ and 25-28 were each denied on the merits by the California
14 Supreme Court in a February 18, 2009, Order which stated in relevant part: “The petition
15 for writ of habeas corpus, filed September 11, 2006, is denied. All claims are denied on
16 the merits.” (Lodgment No. 118.)

17 Moreover, the ineffective assistance of counsel aspects of Claim 14⁴ were denied on
18 the merits by the California Supreme Court in a October 30, 2013, Order which stated in
19 relevant part: “The petition for writ of habeas corpus, filed February 3, 2011, is denied.
20 All claims (I & II) are denied on the merits.” (Lodgment No. 124.)

21 Because these claims were denied on the merits without a statement of reasoning,
22 the Court will conduct an independent review of the record with respect to Claims 12, 14-
23 and 25-28 in order “to determine whether the state court clearly erred in its application

24
25
26 ³ The California Supreme Court alternately held Claims 15 and 16 to be procedurally
27 barred, addressed in section III.A. above.

28 ⁴ The California Supreme Court alternately held this aspect of Claim 14 to be
procedurally barred, addressed in section III.A. above.

1 of Supreme Court Law.” See Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); see
2 also Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) (“Federal habeas review is not
3 *de novo* when the state court does not supply reasoning for its decision, but an independent
4 review of the record is required to determine whether the state court clearly erred in its
5 application of controlling federal law.”); see also Richter, 562 U.S. at 98 (“Where a state
6 court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden must
7 still be met by showing there was no reasonable basis for the state court to deny relief.”)
8 “Under § 2254(d), a habeas court must determine what arguments or theories supported or,
9 as here, could have supported, the state court’s decision; and then it must ask whether it is
10 possible fairminded jurists could disagree that those arguments or theories are inconsistent
11 with the holding in a prior decision of this Court.” Id. at 102.

12 **B. Standard for Evidentiary Hearing**

13 For claims previously decided on the merits by a state court, the Supreme Court has
14 held that a federal habeas court’s “review under § 2254(d)(1) is limited to the record that
15 was before the state court that adjudicated the claim on the merits.” Cullen v. Pinholster,
16 563 U.S. 170, 181 (2011). “Although state prisoners may sometimes submit new evidence
17 in federal court, AEDPA’s statutory scheme is designed to strongly discourage them from
18 doing so.” Id. at 186. Section 2254(d)(2), meanwhile, expressly limits a reviewing court
19 to the “evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2).

20 Section 2254(e)(2) of AEDPA further limits the circumstances under which a district
21 court may hold an evidentiary hearing. If the prisoner “has failed to develop the factual
22 basis of a claim in State court proceedings,” a district court is precluded from holding an
23 evidentiary hearing unless the prisoner meets certain narrow exceptions. 28 U.S.C.
24 § 2254(e)(2). The claim in question must either rely upon “(i) a new rule of constitutional
25 law, made retroactive to cases on collateral review by the Supreme Court, that was
26 previously unavailable” or “(ii) a factual predicate that could not have been previously
27 discovered through the exercise of due diligence;” and the prisoner must show that “the
28 facts underlying the claim would be sufficient to establish by clear and convincing evidence

1 that but for constitutional error, no reasonable factfinder would have found the applicant
2 guilty of the underlying offense.” Id. “Section 2254(e)(2) continues to have force where
3 § 2254(d)(1) does not bar habeas relief,” for instance, “when deciding claims that were not
4 adjudicated on the merits in state court.” Pinholster, 563 U.S. at 185.

5 “Because the deferential standards prescribed by § 2254 control whether to grant
6 habeas relief, a federal court must take into account those standards in deciding whether an
7 evidentiary hearing is appropriate.” Landrigan, 550 U.S. at 474. “It follows that if the
8 record refutes the applicant’s factual allegations or otherwise precludes relief, a district
9 court is not required to hold an evidentiary hearing.” Id.; see also Sully v. Ayers, 725 F.3d
10 1057, 1075 (9th Cir. 2013) (“[A]n evidentiary hearing is pointless once the district court
11 has determined that § 2254(d) precludes habeas relief.”)

12 In light of these limitations, the Court will conduct a section 2254(d) review,
13 provided the claims at issue are subject to section 2254(d), together with the evaluation of
14 Petitioner’s request for an evidentiary hearing on Claims 13-23 and 25.

15 **C. Standard for Claims of Ineffective Assistance of Counsel**

16 Petitioner raises numerous independent claims of ineffective assistance of counsel
17 at both the guilt and penalty phases, including allegations that trial counsel was ineffective
18 for failing to object to instances of prosecutorial misconduct and with respect to asserted
19 Brady violations. Given that these claims appear throughout the SAP, the Court sets forth
20 the relevant standard prior to the outset of the discussion.

21 Pursuant to the clearly established standard set forth in Strickland v. Washington,
22 466 U.S. 668, 687 (1984), “a defendant must show both deficient performance and
23 prejudice in order to prove that he has received ineffective assistance of counsel.” Knowles
24 v. Mirzayance, 556 U.S. 111, 122 (2009), citing Strickland, 466 U.S. at 687. “Surmounting
25 Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

26 “When a convicted defendant complains of the ineffectiveness of counsel’s
27 assistance, the defendant must show that counsel’s representation fell below an objective
28 standard of reasonableness.” Strickland, 466 U.S. at 687-88. “[A] court must indulge a

1 strong presumption that counsel's conduct falls within the wide range of reasonable
2 professional assistance; that is, the defendant must overcome the presumption that, under
3 the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at
4 689 ("Judicial scrutiny of counsel's performance must be highly deferential.")

5 To establish prejudice, the petitioner must demonstrate that "there is a reasonable
6 probability that, but for counsel's unprofessional errors, the result of the proceeding would
7 have been different." Id. at 694. "A reasonable probability is a probability sufficient to
8 undermine confidence in the outcome." Id.; see also id. at 691 ("An error by counsel, even
9 if professionally unreasonable, does not warrant setting aside the judgment of a criminal
10 proceeding if the error had no effect on the judgment.") "The likelihood of a different
11 result must be substantial, not just conceivable." Richter, 562 U.S. at 112.

12 With respect to the penalty phase, "[i]n assessing prejudice, we reweigh the evidence
13 in aggravation against the totality of available mitigating evidence." Wiggins v. Smith,
14 539 U.S. 510, 534 (2003); Williams, 529 U.S. at 397-98 (the court must "evaluate the
15 totality of the available mitigation evidence – both that adduced at trial, and the evidence
16 adduced in the habeas proceeding – in reweighing it against the evidence in aggravation.");
17 Wong v. Belmontes, 558 U.S. 15, 26 (2009) (per curiam) ("[T]he reviewing court must
18 consider all the evidence—the good and the bad—when evaluating prejudice."), citing
19 Strickland, 466 U.S. at 695-96.

20 Moreover, when a federal habeas court is reviewing a claim of ineffective assistance
21 of counsel previously adjudicated on the merits by a state court:

22 The pivotal question is whether the state court's application of the Strickland
23 standard was unreasonable. This is different from asking whether defense
24 counsel's performance fell below Strickland's standard. Were that the inquiry,
25 the analysis would be no different than if, for example, this Court were
26 adjudicating a Strickland claim on direct review of a criminal conviction in a
27 United States district court. Under AEDPA, though, it is a necessary premise
28 that the two questions are different. For purposes of § 2254(d)(1), "an
unreasonable application of federal law is different from an *incorrect*
application of federal law." Williams, supra, at 410, 120 S.Ct. 1495. A state

court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.

Richter, 562 U.S. at 101. “When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland’s deferential standard.” Id. at 105.

V. DISCUSSION

A. Jury Selection Claims

1. Claim 1

Petitioner asserts that the “trial court erred in refusing to find a *prima facie* case of purposeful discrimination” when the prosecutor struck three of four Hispanic individuals from the sitting jury panel, prospective jurors L.H. and M.A. and prospective alternate juror Y.M.,⁵ and additionally erred “in failing to require the prosecutor to state reasons for the strikes, and then to evaluate the genuineness of the reasons as required by Batson.” (SAP at 10.) Petitioner also asserts that “[t]he California Supreme Court’s rejection of this claim was an unreasonable application of Johnson because it failed to acknowledge that the showing supported an inference of discrimination that was sufficient to have required the prosecutor to state his reasons for the strikes. Instead, the Supreme Court engaged in the prohibited exercise of reviewing the trial record regarding the struck jurors and identifying colorable reasons why the prosecutor might have legitimately struck the three jurors.” (*Id.* at 15.)

Petitioner raised this claim on direct appeal, where the California Supreme Court rejected it in a reasoned opinion, as follows:

Defendant contends that the prosecution's striking of Hispanic prospective jurors violated his right to equal protection under the Fourteenth Amendment to the United States Constitution. For the reasons discussed below, we conclude the trial court did not err in denying defendant's motion

⁵ The Court will refer to each member of the jury venire by their first and last initials only, following the practice of the California Supreme Court in this case.

1 under *Batson v. Kentucky* (1986) 476 U.S. 79, 84–89, 106 S.Ct. 1712, 90
2 L.Ed.2d 69 (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277,
3 148 Cal.Rptr. 890, 583 P.2d 748 (*Wheeler*).

4 The prosecutor exercised peremptory challenges against three Hispanic
5 jurors: M. A., L. H., and Y. M. Alvarado made an objection to each excusal
6 under *Batson/Wheeler*, in which defendant joined. The prosecution argued
7 that the codefendants had not made a *prima facie* showing, given that one
8 Hispanic juror, P. G., was on the panel. The trial court found no *prima facie*
9 showing and denied the motion, basing its ruling on a review of the jurors’
10 voir dire transcripts, which disclosed neutral grounds for the challenges, and
11 on the presence of at least one Hispanic juror on the panel, P. G.

12 Both the state and federal Constitutions prohibit the use of peremptory
13 challenges to remove prospective jurors based solely on group bias. (*Batson*,
14 *supra*, 476 U.S. at p. 89, 106 S.Ct. 1712; *Wheeler*, *supra*, 22 Cal.3d at pp.
15 276–277, 148 Cal.Rptr. 890, 583 P.2d 748.) Recently, “the United States
16 Supreme Court reaffirmed that *Batson* states the procedure and standard to be
17 employed by trial courts when challenges such as defendant’s are made. ‘First,
18 the defendant must make out a *prima facie* case by “showing that the totality
19 of the relevant facts gives rise to an inference of discriminatory purpose.”
20 [Citations.] Second, once the defendant has made out a *prima facie* case, the
21 “burden shifts to the State to explain adequately the racial exclusion” by
22 offering permissible race-neutral justifications for the strikes. [Citations.]
23 Third, “[i]f a race-neutral explanation is tendered, the trial court must then
24 decide ... whether the opponent of the strike has proved purposeful racial
25 discrimination.” [Citation.]’” (*People v. Cornwell* (2005) 37 Cal.4th 50, 66–
26 67, 33 Cal.Rptr.3d 1, 117 P.3d 622 (*Cornwell*), quoting *Johnson v. California*
27 (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, fn. omitted
28 (*Johnson*).)

29 The high court clarified that “a defendant satisfies the requirements of
30 *Batson*’s first step by producing evidence sufficient to permit the trial judge
31 to draw an inference that discrimination has occurred.” (*Johnson*, *supra*, 545
32 U.S. at p. 170, 125 S.Ct. 2410, revg. in part *People v. Johnson* (2003) 30
33 Cal.4th 1302, 1318, 1 Cal.Rptr.3d 1, 71 P.3d 270 [requiring the defendant to
34 “show that it is more likely than not the other party’s peremptory challenges,
35 if unexplained, were based on impermissible group bias”].) “When a trial
36 court denies a *Wheeler* motion without finding a *prima facie* case of group
37 bias, the appellate court reviews the record of voir dire for evidence to support
38 the trial court’s ruling. [Citations.] We will affirm the ruling where the record

1 suggests grounds upon which the prosecutor might reasonably have
2 challenged the jurors in question.”” (*Guerra, supra*, 37 Cal.4th at p. 1101, 40
3 Cal.Rptr.3d 118, 129 P.3d 321, quoting *People v. Farnam* (2002) 28 Cal.4th
107, 135, 121 Cal.Rptr.2d 106, 47 P.3d 988.)

4 As a preliminary matter, defendant contends that because the trial court
5 did not articulate the standard it used to determine whether he established a
6 prima facie discrimination case, we must presume it used the then current
7 “strong likelihood” standard. Defendant asserts that this standard sets a higher
8 threshold than the *Batson* standard of an “inference” of group bias. Defendant
9 also claims that because the trial court used the incorrect standard, its ruling
10 is entitled to no deference.^{FN15} But as we have held in analyzing
11 *Batson/Wheeler* claims, “[r]egardless of the standard employed by the trial
12 court, and even assuming without deciding that the trial court’s decision is not
13 entitled to deference, we have reviewed the record and, like the United States
14 Supreme Court in *Johnson* ... [we] are able to apply the high court’s standard
15 and resolve the legal question whether the record supports an inference that
16 the prosecutor excused a juror on the basis of race.” (*Cornwell, supra*, 37
17 Cal.4th at p. 73, 33 Cal.Rptr.3d 1, 117 P.3d 622, italics omitted; *Guerra,*
18 *supra*, 37 Cal.4th at p. 1101, 40 Cal.Rptr.3d 118, 129 P.3d 321.)

19 FN15. Defendant also contends that the trial court’s ruling
20 deserves no deference because, in the course of discussing the
21 motion, the trial court mentioned that “there were two African–
22 American representatives on the jury.” Defendant argues that this
23 demonstrates a misunderstanding of the purpose of *Batson*. We
24 need not reach this issue, because as explained below, our
25 conclusion that defendant did not make a prima facie showing is
26 based on our review of the record, not on deference to the trial
27 court’s ruling or reasoning.

28 As to the three challenged jurors, defense trial counsel sought to
29 establish a prima facie case of discrimination solely on the circumstance that
30 the prosecutor struck three individuals of Hispanic ancestry, and that
31 defendant was of the same ancestry. On appeal, defendant contends that a
32 prima facie case is established because the prosecutor struck three of the only
33 four Hispanics called to serve on the jury. In the alternative, defendant claims
34 that the fact that all three struck jurors were Hispanic women supports a prima
35 facie case of discrimination against Hispanic women as a cognizable class.
36 We will assume, without deciding, that defendant’s claim of discrimination as
37 to Hispanic women specifically (as opposed to Hispanics generally) is not
38

1 forfeited on appeal because he failed to present it below. (See *People v. Lewis*
2 and *Oliver* (2006) 39 Cal.4th 970, 1016, fn. 12, 47 Cal.Rptr.3d 467, 140 P.3d
3 775 (*Lewis and Oliver*)).

4 We have held that, although a prosecutor's excusal of all members of a
5 particular group may establish a *prima facie* discrimination case, especially if
6 the defendant belongs to the same group, this fact alone is not conclusive.
7 (*Guerra* *supra*, 37 Cal.4th at p. 1101–1102, 40 Cal.Rptr.3d 118, 129 P.3d 321;
8 *People v. Crittenden* (1994) 9 Cal.4th 83, 119, 36 Cal.Rptr.2d 474, 885 P.2d
9 887 (*Crittenden*); but see *Johnson*, *supra*, 545 U.S. at pp. 166, 173, 125 S.Ct.
10 2410 [the removal of all three African-American prospective jurors
11 established a *prima facie* case].) The prosecution did not excuse all Hispanic
12 jurors, and defendant is a Hispanic man, not a Hispanic woman. In any event,
13 as discussed below, the record discloses race-neutral grounds for the
14 prosecutor's peremptory challenges. (*Guerra*, *supra*, 37 Cal.4th at p. 1101, 40
15 Cal.Rptr.3d 118, 129 P.3d 321.)

16 *1. Prospective Juror M. A.*

17 During voir dire, Prospective Juror M. A. stated that Spanish was her
18 primary language, and that she did not speak English well or understand many
19 words. She stated she did not have any strong feelings either for or against
20 capital punishment. Defense counsel moved to excuse M. A. for cause
21 because she lacked sufficient skills in both written and spoken English, and
22 because her problems with speaking and understanding English could affect
23 her ability to interact with the other jurors during deliberations. The
24 prosecutor agreed and also requested that she be excused for cause. Trial
25 counsel for Alvarado opposed the for-cause challenge. The trial court denied
26 the challenge, and stated the parties would have to deal with excusing M. A.
27 through a peremptory challenge.

28 Defendant contends that because the trial court denied the challenge for
29 cause based on M. A.'s limited English language skills, this ground is not a
30 valid basis for a peremptory challenge either. But the circumstance that a juror
31 is not subject to exclusion for cause does not, on its own, support an inference
32 that group bias motivated the peremptory challenge. (*Cornwell*, *supra*, 37
33 Cal.4th at p. 70, 33 Cal.Rptr.3d 1, 117 P.3d 622.) The record demonstrates
34 both the prosecutor and defendant's own counsel were reasonably concerned
35 about the prospective juror's English language skills and, on this basis, the
36 prosecutor was entitled to excuse her.

2. Prospective Juror L. H.

During voir dire, Prospective Juror L.H. stated she tended to favor life imprisonment, rather than the death penalty, as the appropriate punishment. She observed that she could keep an open mind, but would have to be "really convinced" before returning a death verdict. Although the trial court had explained at some length that neither side bore a burden of proof in the penalty phase, when asked by the prosecutor if she would place a burden of proof on either party regarding the appropriate punishment, she responded, "Prosecution."

At best, L.H. appeared equivocal about the death penalty, and at worst, she appeared biased against it. Defendant claims that although she stated during voir dire that she would lean toward imposing life imprisonment, she also said she could keep an open mind. That a juror is equivocal about his or her ability to impose the death penalty is relevant to a challenge for cause, but does not undercut the race-neutral basis for a prosecutor's decision to excuse a prospective juror peremptorily. (*People v. Catlin* (2001) 26 Cal.4th 81, 118, 109 Cal.Rptr.2d 31, 26 P.3d 357.) The record strongly suggests the prosecutor had grounds for concern about her possible bias against the death penalty, and on this basis was entitled to excuse her.

3. Prospective Juror Y. M.

During the court's voir dire, Prospective Juror Y.M. stated she had strong religious beliefs against the death penalty and she could not return a death sentence. During the prosecution's voir dire, she again expressed religious reservations against the death penalty, but asserted she could sit as a juror in this case. The trial court denied the prosecutor's for cause challenge of Y. M., but allowed the prosecutor to exercise a peremptory challenge against Y. M. after finding that Y. M. had strong feelings against the death penalty. The record suggests the prosecutor had reason for concern about Y. M.'s possible bias against the death penalty, and on this basis, he was entitled to excuse her.

4. Group Attitude

In addition, defendant claims that, even if Prospective Jurors L. H. and Y. M. exhibited a bias against the death penalty, most Hispanic women actually feel this way, so that any disqualification of a Hispanic woman based on her beliefs about the death penalty would constitute improper bias against

1 this group. We note that defendant points to no evidence in the record to
2 support his speculation about Hispanic women's beliefs. In any event, we
3 have recently rejected a similar contention. (*Lewis and Oliver, supra*, 39
4 Cal.4th at p. 1016, 47 Cal.Rptr.3d 467, 140 P.3d 775.) A prosecutor may
5 excuse prospective jurors, including members of cognizable groups, based on
6 personal, individual biases those prospective jurors *actually* express, even if
the biased view or attitude may be more widely held inside the cognizable
group than outside of it. (*Ibid.*)

7 Hoyos, 41 Cal. 4th at 899-903 (brackets in original).

8 In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that "the State's
9 privilege to strike individual jurors through peremptory challenges, is subject to the
10 commands of the Equal Protection Clause," and stated that "the Equal Protection Clause
11 forbids the prosecutor to challenge potential jurors solely on account of their race." Id. at
12 89. The Batson Court outlined a three-step procedure to evaluate such claims, restated in
13 Johnson v. California, 545 U.S. 162 (2005), as follows:

14 First, the defendant must make out a prima facie case "by showing that the
15 totality of the relevant facts gives rise to an inference of discriminatory
16 purpose." 476 U.S., at 93-94, 106 S.Ct. 1712 (citing *Washington v. Davis*,
17 426 U.S. 229, 239-242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). Second, once
18 the defendant has made out a prima facie case, the "burden shifts to the State
19 to explain adequately the racial exclusion" by offering permissible race-
neutral justifications for the strikes. 476 U.S., at 94, 106 S.Ct. 1712; see also
20 *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 31 L.Ed.2d 536
21 (1972). Third, "[i]f a race-neutral explanation is tendered, the trial court must
then decide . . . whether the opponent of the strike has proved purposeful racial
22 discrimination." *Purkett v. Elem*, 514 U.S. 765, 767, 115 St. 1769, 131
L.Ed.2d 834 (1995) (*per curiam*).

23 Id. at 168 (footnote omitted) (bracket in original).

24 To state a prima facie case under Batson's first step, a defendant "must show that
25 (1) the prospective juror is a member of a 'cognizable racial group,' (2) the prosecutor used
26 a peremptory strike to remove the juror and (3) the totality of the circumstances raises an
27 inference that the strike was on account of race." Crittenden v. Ayers, 624 F.3d 943, 955
28 (9th Cir. 2010), quoting Batson, 476 U.S. at 96. "A pattern of exclusion of minority

1 venirepersons provides support for an inference of discrimination.” Turner v. Marshall, 63
2 F.3d 807, 812 (9th Cir. 1995), overruled on other grounds by Tolbert v. Page, 182 F.3d 677
3 (9th Cir. 1999) (en banc); see also Batson, 476 U.S. at 97 (“[A] ‘pattern’ of strikes against
4 [minority] jurors included in the particular venire might give rise to an inference of
5 discrimination.”) A statistical disparity, such as showing that strikes were
6 disproportionately used against minority jurors, can satisfy this first step. See e.g.
7 Fernandez v. Roe, 286 F.3d 1073, 1078 (9th Cir. 2002) (prosecutor’s use of four of
8 nineteen, or 21 percent, of challenges to strike four of seven Hispanic prospective jurors,
9 where Hispanics comprised only 12 percent of venire, supported an inference of
10 discrimination).

11 During jury selection, defense counsel raised a challenge to the prosecutor’s exercise
12 of peremptory challenges against two female Hispanic prospective jurors; the trial court
13 heard the challenge after all the jurors and alternates had been selected, at which time the
14 defense additionally challenged the prosecutor’s decision to exercise a peremptory
15 challenge to excuse a third female Hispanic individual from the panel of prospective
16 alternate jurors. At the hearing on the challenges, trial counsel asserted the grounds for the
17 defense’s Batson/Wheeler motion, stating that three individuals of “Mexican ancestry” had
18 been excused through prosecutor’s use of peremptory challenges and that Petitioner “was
19 of the cognizable class.” (Reporter’s Transcript [“RT”] 2786-87.) In response, the trial
20 prosecutor contended that a *prima facie* showing had not been made and pointed to the
21 presence of a Hispanic juror on the panel; the prosecutor also noted that “[t]here was
22 another, I would argue, Hispanic on the jury as an alternate, but that came after the motion
23 is made. So I don’t believe it would be proper for the court to consider that at this time.”
24 (RT 2787.)

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1 The trial court considered the challenge, stating “I have to make a determination as
2 to whether, considering everything, whether or not these preemptory [sic] challenges were
3 exercised based upon a discriminatory approach to this jury.” (RT 2788.) The judge stated
4 that he was “mindful” that a Hispanic man was on the jury, as well as members of other
5 minority groups, such as two Black jurors. (Id.) The judge referenced the voir dire record
6 and noted reasons why each of the three prospective jurors may have been excused,
7 specifically noting that M.A. expressed difficulty with the English language, Y.M. voiced
8 an objection to the death penalty, and L.H. would tend to side with life in prison rather than
9 the death penalty. (RT 2788-89.) The trial court then stated that:

10 Observing the manner which all of these jurors were questioned by the
11 prosecution, the extent of the questioning, the use of these preemptories [sic],
12 the presence of at least one Hispanic on the panel, Mr. P[] G[], it seems to me
13 that there really isn’t anything from which I could reasonably find the exercise
14 of preemptories [sic] based on race. Some attempt to exclude Hispanics, that
15 doesn’t seem to be the case at all in each of these cases.

16 It seems to me that a reasonable individual would be inclined to perhaps
17 exclude these jurors on matters solely independent of race. I just don’t see it.
18 And I feel that there isn’t really any type of substantial showing at all of the
19 use of preemptories [sic] based upon race. So I find there is not a *prima facie*
20 showing. The prosecution had the right to excuse these individuals for reasons
21 other than race.

22 And it seems to me that even without inquiring of the prosecution as to the
23 specifics, one can pretty well see on the face of the information that was
24 presented by the jurors that race is not an issue that caused them to be
25 excluded.

26 (RT 2789-90.)

27 After trial, but prior to the California Supreme Court’s adjudication of this issue on
28 direct appeal, the United States Supreme Court issued Johnson, which struck down
California’s “more likely than not” standard for determining if a defendant has established
a *prima facie* case of discrimination in jury selection, and reaffirmed that “a defendant
satisfies the requirements of Batson’s first step by producing evidence sufficient to permit

1 the trial judge to draw an inference that discrimination has occurred.” Johnson, 545 U.S.
2 at 170.

3 The California Supreme Court acknowledged that the trial court’s decision was
4 made prior to Johnson, and accordingly did not render a decision on whether the trial court
5 had applied the correct standard, but instead explicitly stated that the adjudication of
6 Petitioner’s claim would be based on the state supreme court’s own application of Johnson,
7 as follows:

8 But as we have held in analyzing *Batson/Wheeler* claims, “[r]egardless of the
9 standard employed by the trial court, and even assuming without deciding that
10 the trial court’s decision is not entitled to deference, we have reviewed the
11 record and, like the United States Supreme Court in *Johnson* ... [we] are able
12 to apply the high court’s standard and resolve the legal question whether the
13 record supports an inference that the prosecutor excused a juror on the basis
14 of race.” (*Cornwell, supra*, 37 Cal.4th at p. 73, 33 Cal.Rptr.3d 1, 117 P.3d
622, italics omitted; *Guerra, supra*, 37 Cal.4th at p. 1101, 40 Cal.Rptr.3d 118,
129 P.3d 321.)

15 Hoyos, 41 Cal. 4th at 901 (brackets in original); see also id. at 901 n. 15 (declining to
16 address Petitioner’s argument that the trial court decision was not entitled to deference due
17 to the trial court’s consideration that the jury also contained two Black jurors, again stating
18 “our conclusion that defendant did not make a *prima facie* showing is based on our review
19 of the record, not on deference to the trial court’s ruling or reasoning.”)

20 Petitioner asserts that the California Supreme Court’s decision was unreasonable
21 because “[t]he CSC, with the benefit of Johnson- equally ignored petitioner’s evidence of
22 statistical disparity, and instead erroneously and unreasonably proceeded ‘to affirm the
23 (trial court’s) ruling where the record suggests grounds upon which the prosecutor might
24 reasonably have challenged the jurors in question,’ [sic] Hoyos, 41 Cal. 4th 873, 900.”
25 (Reply at 4.) The section of the direct appeal opinion to which Petitioner refers is at the
26 outset of the California Supreme Court’s discussion of the Batson claim, where the state
27 supreme court simply recited the general standard *usually* employed when reviewing a trial
28 court’s decision. However, in evaluating Petitioner’s claim, the California Supreme Court

1 explicitly stated that it would conduct its *own analysis* as to whether a prima facie case had
2 been made.⁶ Thus, contrary to Petitioner's assertion, the state supreme court did not simply
3 review the record for grounds upon which to affirm the trial court's ruling.

4 Instead, the California Supreme Court correctly recognized and articulated the
5 controlling Supreme Court authority set forth in Johnson, and stated that it would itself
6 review the record and independently determine "whether the record supports an inference
7 that the prosecutor excused a juror on the basis of race." Compare Hoyos, 41 Cal. 4th at
8 901 with Johnson, 545 U.S. at 170 ("[A] defendant satisfies the requirements of Batson's
9 first step by producing evidence sufficient to permit the trial judge to draw an inference
10 that discrimination has occurred.")

11 The California Supreme Court specifically addressed Petitioner's statistical
12 arguments,⁷ recounting that "trial counsel sought to establish a prima facie case of
13

14
15 ⁶ Contrast Hoyos, 41 Cal. 4th at 901 n.15 ("[O]ur conclusion that defendant did not
16 make a prima facie showing is based on our review of the record, not on deference to the
17 trial court's ruling or reasoning."), with Currie v. McDowell, 825 F.3d 603, 608-09 (9th
18 Cir. 2016) ("[T]he state appellate court violated clearly established federal law in its Batson
19 step one analysis by affirming because 'the record suggest[ed] grounds upon which the
20 prosecutor might reasonably have challenged the jurors in question,' whether or not those
21 were the reasons proffered," where the state appellate court held that "[s]ubstantial
22 evidence supports the trial court's stated conclusion that [the juror] was not a desirable
23 panelist for the prosecution because she had two relatives who had been arrested for drug
24 offenses, and that consequently, no prima facie case had been made," and additionally
25 holding that the state court's alternative Batson step three analysis was unreasonable under
26 § 2254(d)(2).))

27
28 ⁷ On direct appeal, Petitioner also raised the following contention: "In the alternative,
29 defendant claims that the fact that all three struck jurors were Hispanic women supports a
30 prima facie case of discrimination against Hispanic women as a cognizable class." Hoyos,
31 41 Cal. 4th at 901. The California Supreme Court rejected this argument. Id. at 903. To
32 the extent Petitioner renews this assertion in the instant Petition, he fails to demonstrate
33 that the California Supreme Court adjudication was contrary to, or an unreasonable
34 application of, any clearly established federal law, given that "neither the Supreme Court
35 nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black

1 discrimination solely on the circumstance that the prosecutor struck three individuals of
2 Hispanic ancestry, and that defendant was of the same ancestry. On appeal, defendant
3 contends that a *prima facie* case is established because the prosecutor struck three of the
4 only four Hispanics called to serve on the jury.” Hoyos, 41 Cal. 4th at 901. The California
5 Supreme Court then stated that “although a prosecutor’s excusal of all members of a
6 particular group may establish a *prima facie* discrimination case, especially if the defendant
7 belongs to the same group, this fact alone is not conclusive.” Id. The state supreme court
8 noted that not all prospective Hispanic jurors had been excused from Petitioner’s jury
9 venire,⁸ that “the record discloses race-neutral grounds for the prosecutor’s peremptory
10 challenges,” and proceeded to discuss those reasons. Id. at 901-03.

11 Thus, Petitioner’s argument that the California Supreme Court “ignored petitioner’s
12 evidence of statistical disparity” is not supported by the record. The California Supreme
13 Court explicitly acknowledged Petitioner’s argument, but was unpersuaded that Petitioner
14 demonstrated a *prima facie* case. This conclusion was not unreasonable, given the de
15 *minimus* nature of Petitioner’s statistical showing. “Although a pattern of strikes against

17
18 males,’ may establish a cognizable group for Batson purposes.” Turner, 63 F.3d at 812,
19 overruled on other grounds by Tolbert, 182 F.3d 677.

20 ⁸ As noted above, the record reflects that five, not four, Hispanic individuals were
21 called to serve on Petitioner’s jury and subject to potential peremptory challenges. (RT
22 2787.) While the trial prosecutor stated that it would not be “proper” to consider the fifth
23 individual, an alternate called to serve after the third peremptory challenge (id.), the record
24 further reflects that juror M.A. was the sole subject of the defense’s initial motion; when
25 the trial court stated an intention to hear the motion “at a later time” counsel stated that “I
26 was thinking also of making the same objection for the excusing of [L.H.].” (RT 2752.) It
27 was only after all of the jurors and alternate jurors had been selected and sworn that defense
28 counsel added L.H. and Y.M. to the Batson/Wheeler motion. (See RT 2749, 2758 (jurors
and alternates sworn); RT 2762.) As such, if the Court considers Y.M. in this analysis,
who was challenged after the initial motion, it appears reasonable to at least note that there
was also an additional Hispanic juror seated after the initial motion, particularly in light of
the fact that this alternate juror actually ended up serving on Petitioner’s jury, replacing a
juror who was excused for sleeping during trial. (See RT 3831; CT 3540.)

1 [a minority group] provides support for an inference of discrimination, [Petitioner] must
2 point to more facts than the number of [minority group members] struck to establish such
3 a pattern.” Williams v. Woodford, 384 F.3d 567, 584 (9th Cir. 2002) (internal citation
4 omitted). Petitioner offers little aside from the fact that three Hispanic jurors were subject
5 to peremptory challenges; while the Court can count the number of juror questionnaires to
6 ascertain how many prospective jurors were in the venire after hardship excusals (assuming
7 that all juror questionnaires were retained), the record does not disclose how many
8 Hispanic jurors were in the venire as a whole, rendering incomplete any attempt to
9 determine whether there was a statistical disparity. See id. (“[B]ecause [Petitioner] failed
10 to allege, and the record does not disclose, facts like how many [group members] sat on
11 the jury, how many [group members] were in the venire, and how large the venire was, it
12 is impossible to say whether any statistical disparity existed that might support an inference
13 of discrimination.”)

14 Petitioner also argues that the California Supreme Court erred in considering the trial
15 record and the possible reasons for excusing the three prospective jurors at issue, given the
16 existence of authority, including Williams v. Runnels, 432 F.3d 1102 (9th Cir. 2006) and
17 Johnson, criticizing such speculation. (SAP at 15-17.) In Johnson, the Supreme Court
18 indeed stated that: “The inherent uncertainty present in inquiries of discriminatory purpose
19 counsels against engaging in needless and imperfect speculation when a direct answer can
20 be obtained by asking a simple question.” Johnson, 545 U.S. at 172, citing Paulino v.
21 Castro, 371 F.3d 1083, 1090 (9th Cir. 2004) (“[I]t does not matter that the [prosecutor]
22 might have had good reasons . . . [;] [w]hat matters is the real reason they were stricken”);
23 see also Miller-El v. Dretke, 545 U.S. 231, 252 (2005) (“A Batson challenge does not call
24 for a mere exercise in thinking up any rational basis.”)

25 However, the situations presented are distinguishable, as the defendants in those
26 cases had already established an inference of discrimination based on the statistical
27 showing alone, satisfying Batson’s first step, while the California Supreme Court, applying
28 Johnson, held that Petitioner had not done so in this case. For instance, in Williams, the

1 Ninth Circuit conducted a de novo review⁹ of Williams' Batson claim, finding a statistical
2 disparity sufficient to satisfy the first Batson step where the prosecutor used three of his
3 first four peremptory challenges to remove Black jurors from the venire and only four of
4 the first forty-nine prospective jurors were Black, and stated that "to rebut an inference of
5 discriminatory purpose based on statistical disparity, the 'other relevant circumstances'
6 must do more than indicate that the record would support race-neutral reasons for the
7 questioned challenges." Id. at 1108. Similarly, in Johnson, despite three peremptory
8 challenges against minority jurors each resulting in a defense objection, which prompted
9 the trial court's comments that "we are very close" under California's "more likely than
10 not" standard, and the California Supreme Court's comment that the excusals "certainly
11 looks suspicious," the United States Supreme Court criticized the procedure where "[t]he
12 trial judge still did not seek an explanation from the prosecutor. Instead, she explained that
13 her own examination of the record had convinced her that the prosecutor's strikes could be
14 justified by race-neutral reasons." Id., 545 U.S. at 165-66. The Johnson Court explained
15 that "[t]he Batson framework is designed to produce actual answers to suspicions and
16 inferences that discrimination may have infected the jury selection process." Id. at 172. In
17 both cases, once the defendant had established a prima facie inference of discrimination, it
18 was incumbent for the court to discern the real reasons for the peremptory challenges, and
19 to not rely on speculation in its stead. But a defendant *must first establish* that an inference
20 of discrimination exists, which is the very standard the California Supreme Court applied.

22

23 ⁹ Petitioner's case is further distinguishable on this basis, as the Ninth Circuit
24 conducted a de novo review in Williams because the state court applied the "strong
25 likelihood standard" in reviewing the Batson claim. See Williams, 432 F.3d at 1105; see also Shirley v. Yates, 807 F.3d 1090, 1101 (9th Cir. 2015) (agreeing with district court's
26 finding that state appellate court "acted contrary to clearly established law when it 'based
27 its prima facie analysis on the discredited pre-Johnson, standard articulated by the
28 California Supreme Court in *People v. Box. . .*'"); Johnson v. Finn, 665 F.3d 1063, 1068-69 (9th Cir. 2011) (same). Unlike in those cases, the California Supreme Court specifically
cited and applied Johnson in deciding Petitioner's claim.

1 In rendering its decision in this case, the California Supreme Court repeatedly cited People
2 v. Cornwell, 37 Cal. 4th 50 (2005), which referenced Johnson in discussing the relevant
3 standard, as follows:

4 Once the trial court concludes that the defendant has produced evidence
5 raising an inference of discrimination, the court should not speculate as to the
6 prosecutor's reasons- it should inquire of the prosecutor, as the high court
7 directed. But there is still a first step to be taken by the defendant, namely
8 producing evidence from which the trial court may infer 'that discrimination
9 has occurred.'

10 Cornwell, 37 Cal. 4th at 73-74, quoting Johnson, 545 U.S. at 170, overruled on other
11 grounds by People v. Doolin, 45 Cal. 4th 390, 421 n. 22 (2009).

12 The United States Supreme Court has also specifically stated that: "In deciding
13 whether the defendant has made the requisite showing, the trial court should consider all
14 relevant circumstances." Batson, 476 U.S. at 96. "For example, a 'pattern' of strikes
15 against black jurors included in the particular venire might give rise to an inference of
16 discrimination. Similarly, the prosecutor's questions and statements during *voir dire*
17 examination and in exercising his challenges may support or refute an inference of
18 discriminatory purpose." Id. at 97; see also United States v. Collins, 551 F.3d 914, 921
19 (9th Cir. 2009) ("[T]he fact that the prosecutor fails to 'engage in meaningful questioning
20 of any of the minority jurors' might indicate the presence of discrimination."), quoting
21 Fernandez, 286 F.3d at 1079. In light of this authority approving consideration of the
22 record in determining whether a defendant has made a *prima facie* showing of
23 discrimination, and because the cases Petitioner relies upon are distinguishable from the
24 situation presented here given his failure to establish an inference of discrimination based
25 on the statistical showing alleged, the Court is unable to conclude that the California
Supreme Court's consideration of the record was erroneous or unreasonable.

26 Petitioner also contends that the California Supreme Court's decision was based on
27 an unreasonable determination of the facts. Petitioner argues that the state court, in
28 discussing the jurors' answers in the questionnaires and *voir dire* responses, misstated or

1 mischaracterized the challenged jurors' statements or positions. (Reply at 11-12, 15-16,
2 20-22.) For the reasons discussed below, this argument is similarly unpersuasive.

3 With respect to prospective juror L.H., Petitioner contends that the state court's
4 "characterization of her as 'at best' somewhat 'equivocal about the death penalty,' and 'at
5 worst' 'biased against it' is contradicted by the record," and the state court also
6 unreasonably failed to acknowledge that the juror's answers during voir dire clarifying her
7 positions "at least on its face negated any inference of bias from her earlier answers." (Id.
8 at 16.) The record reflects that L.H. wrote in her questionnaire that: "I believe in the death
9 penalty (and the justice system) but only in certain instances. Although I am not certain
10 what benefit it does for society by executing someone. Life imprisonment may even be
11 harsher in some aspects. The threat of the death penalty does not seem to effect [sic]
12 people." (CT 5579.) L.H. wrote that she had "softened" in her views on capital
13 punishment, and "used to believe any/every murderer deserved the death penalty (except
14 self-defense). I no longer hold this thought." (RT 5580.) During voir dire, the trial court
15 asked about her feelings on capital punishment, to which she stated: "Well, I tend to side
16 with the life in prison as opposed to the death penalty," but stated that she could keep an
17 open mind. (RT 2376.) When the court asked if she could return a death penalty verdict
18 "if in that hypothetical case you were of a mind that the aggravating evidence so
19 substantially outweighed the mitigating evidence that death was in fact warranted" she
20 replied: "I'd have to be really convinced." (RT 2376-77.) When asked again if she could
21 render a death penalty verdict, she answered: "I think I can, but I would have to be real
22 convinced that it outweighed it heavily." (RT 2377.) When the prosecutor asked if she
23 would place a burden on the defense or prosecution to convince her of the appropriate
24 punishment, she stated: "Prosecution." (RT 2413.) When the prosecutor stated that the
25 court instructed the prosecution did not have a burden in the penalty phase, she replied:
26 "Well, I guess I answered that incorrectly. I would have to be convinced of the evidence,
27 of everything all together. That's what I mean." (RT 2413.) L.H. then agreed she could
28 vote for either penalty, depending on which she felt was appropriate, and stated: "If it meets

1 all the aggravating items that are necessary, I would make that decision then.” (RT 2414.)
2 Based on a review of the record, the California Supreme Court’s conclusions did not
3 constitute an unreasonable determination of the facts, as L.H. stated at various times that
4 she would have to be “convinced,” “real convinced” or “really convinced” to vote for the
5 death penalty and that she leaned towards life in prison as a potential punishment,
6 demonstrating at a minimum her equivocal feelings about capital punishment.

7 With respect to Y.M., Petitioner asserts that the state court’s characterization “is
8 repudiated by the record,” and that the state court “exaggerated” and “substantially
9 overstates” her voir dire answers in reporting that she stated “she could not return a death
10 sentence,” given that the trial court had denied the prosecution’s challenge for cause and
11 found that she could follow the court’s instructions. (Reply at 20-22.) Petitioner argues
12 that “the CSC’s failure to acknowledge and address the trial court’s factual finding renders
13 its ruling ‘an unreasonable determination of the facts in light of the evidence presented in
14 the State court proceeding.’” (Id. at 22.)

15 A review of Y.M.’s questionnaire and voir dire responses and the trial court’s
16 statements during the Batson hearing do not support Petitioner’s argument. In the
17 questionnaire, Y.M. wrote that the death penalty is a “scary thought, but I believe in each
18 individual case, given certain facts it is a punishment that should be done.” (CT 5465.)
19 However, she also indicated that she did not want to be a juror in the case, and wrote: “I
20 don’t feel I could be part of a jury, if they impose the death penalty.” (CT 5468.) Y.M.
21 continued to voice her reservations during jury selection as, during voir dire questioning
22 by the trial court, Y.M. stated that: “I just have strong religious beliefs deep down inside.
23 That’s just the way I feel, that it actually shouldn’t happen,” and stated that: “I just don’t
24 feel I would be able to judge somebody feeling that way.” (RT 2023.) In view of these
25 statements, the California Supreme Court was not unreasonable in finding that during voir
26 dire, Y.M. “stated she had strong religious beliefs against the death penalty and she could
27 not return a death sentence.” Hoyos, 41 Cal. 4th at 903. During questioning by defense
28 counsel, Y.M. later said that she thought she could put aside her religious reservations,

1 stating: "I feel strong about it, but I could put them aside." (RT 2064.) When the
2 prosecutor asked about her views, Y.M. stated: "I still feel like it's strong in me, but I feel
3 like I could still make the decision," and when again asked about her ability to put aside
4 her feelings, she said: "I feel like if I did sit, I am strong enough to put it aside." (RT 2069-
5 70.)

6 When the trial court denied the prosecution's challenge for cause, Petitioner is
7 correct that the trial court stated: "She wouldn't like it, but she will follow the instructions
8 and if called upon can serve as a juror in this case." (RT 2075.) Later, during the Batson
9 hearing, the trial court stated that Y.M. "indicated to the court both in her questionnaire
10 [sic] that she, in fact, had a conscientious objection to the death penalty. She indicated
11 orally she would be able to keep an open mind," and that "[t]he prosecution has a right to
12 exercise preemptories [sic] as to individuals who have feelings pro or con so far as the
13 death penalty is concerned." (RT 2789.) Thus, again, based on a review of the record, the
14 California Supreme Court's statement that "[t]he trial court denied the prosecutor's for
15 cause challenge of Y. M., but allowed the prosecutor to exercise a peremptory challenge
16 against Y. M. after finding that Y. M. had strong feelings against the death penalty,"
17 (Hoyos, 41 Cal. 4th at 903), was not unreasonable.

18 With respect to prospective juror M.A., Petitioner contends that the state supreme
19 court "made no reference to the facts in the record that under the applicable case law belied
20 the bona fides of the reason attributed to the prosecutor," and argues that the prosecutor's
21 failure to question M.A. about her English skills and the California Supreme Court's failure
22 to note the trial court's misstatements about the prospective juror's language skills
23 impeding her ability to serve as a juror, each undermined that ground as a reason for the
24 peremptory challenge under Miller-El. (Reply at 12-13.) Petitioner's reliance on Miller-
25 El is misplaced in this regard. In Miller-El, when the prosecutor was confronted with the
26 fact that his stated reason for a peremptory strike was based on a misrepresentation of the
27 prospective juror's position, the prosecutor "suddenly came up with" a separate reason for
28 the strike. Miller-El, 545 U.S. at 245. The Supreme Court declined to accept this new

1 reason for the challenge, stating it “reeks of afterthought” and noting as significant that the
2 prosecutor failed to question the juror in any detail on that matter and finding that a review
3 of the juror’s entire voir dire revealed that he “should have been an ideal juror in the eyes
4 of a prosecutor seeking a death sentence, and the prosecutors’ explanation for the strike
5 cannot reasonably be accepted.” Id. at 245-47.

6 Here, a review of the record reveals that each small group of prospective jurors were
7 questioned in turn by the trial court, each defense counsel and the prosecutor. When the
8 group containing M.A. was questioned, the trial court went first and asked M.A. numerous
9 questions about her English proficiency, given the concerns she noted in the written
10 questionnaire. For instance, M.A. wrote on her questionnaire that she had “por [sic]
11 English” and checked a box indicating that she had trouble speaking or understanding
12 English. (CT 5666.) She also indicated that she would not like to serve as a juror on the
13 case, writing “Not Enough English.” (CT 5677.) M.A. also failed to date or sign her
14 written questionnaire. (Id.) When the trial court asked about her concerns, she stated: “I
15 don’t speak English that well and I don’t understand a lot of words that you are saying. So
16 that’s what I think.” (RT 1932.) M.A. agreed that she was able to understand the written
17 questionnaire, could interrupt and ask if she did not understand something during the
18 proceedings, and could follow the court’s instructions. (RT 1933.) Petitioner’s counsel
19 questioned the jurors after the trial judge, and asked M.A. numerous questions about her
20 language abilities. M.A. agreed that she recalled the court’s instructions included the word
21 aggravating, and when asked to define it, stating “I know what it means, but I don’t know
22 how to describe it,” and similarly stated “I can’t” when asked to describe what mitigating
23 meant. (RT 1953-54.) Co-defendant’s counsel questioned the jurors next and stated that
24 he would “skip some of you,” citing the questionnaires and prior voir dire, stating: “There
25 are a lot of questions both written and oral, and as we get to me I have fewer than were
26 asked before.” (RT 1970.) He did not question M.A. (RT 1970-78.) The prosecutor asked
27 questions last, and upon addressing the group, stated that: “As [defense counsel] said, the
28 questions dwindle and dwindle and dwindle,” similarly noting that he would be “skipping

1 some" jurors in his questioning. (RT 1978-79.) The prosecutor did not question M.A. (RT
2 1979-89.) The trial court then asked M.A. a few additional questions, asking again if she
3 could interrupt trial proceedings if she did not understand, to which she stated: "I don't
4 know. I get real nervous when I come to English. I think I be very nervous then. I try to
5 speak." (RT 1991.) When asked if she might just "let it kind of pass" instead of speaking
6 up when she did not understand, M.A. responded that: "I probably will, yes." (Id.)

7 When the trial court asked if counsel had any challenges for cause, Petitioner's
8 counsel immediately challenged M.A., referencing her mention of "por English" and her
9 lack of written response throughout the majority of the questionnaire. (RT 1999-2000.)
10 Counsel acknowledged that M.A. appeared to "understand[] more than she can describe,"
11 but argued that "no matter what she understands, she couldn't communicate that to other
12 jurors in deliberations and would be likely to be intimidated or a-non [sic] entity in
13 deliberations." (RT 2000.) The prosecutor joined in the challenge for cause, agreeing with
14 the reasons stated by defense counsel and additionally referencing the numerous spelling
15 mistakes throughout M.A.'s written questionnaire and pointing out her failure to sign or
16 date it. (RT 2001-02.) The trial court responded: "The questionnaire is filled with spelling
17 errors, but that's not a challenge for cause. She was unable to define certain legal terms;
18 that doesn't constitute a challenge for cause, frankly. She seemed to be relatively articulate
19 in response to questions. She said she would be hesitant or reluctant to interrupt if she
20 didn't understand something," but noted that many jurors would be similarly hesitant,
21 which was the reason the court had a procedure allowing the jurors to ask questions via
22 notes. (RT 2002-03.) The trial court denied the challenge, stating: "You will have to deal
23 with that on your preemptories [sic]." (RT 2003.) The Court is not persuaded that the
24 prosecutor's failure to specifically question M.A. about her language abilities undermines
25 this reason as a basis for the challenge. Contrary to the situation presented in Miller-El, it
26 is obvious that both Petitioner's defense counsel and the prosecutor were concerned about
27 this juror's English skills and ability to understand the proceedings and communicate with
28 the other jury members. Moreover, the trial court, in denying the challenge for cause,

1 stated that in order to excuse the juror, counsel would need to use a peremptory challenge.
2 Petitioner has not demonstrated that the California Supreme Court's decision was based on
3 an unreasonable determination of the facts, as the record reflects that M.A. repeatedly
4 expressed concerns, in both her written questionnaire and during voir dire, that her English
5 skills would hinder her ability to serve as a juror. (See e.g. CT 5666, 5677; RT 1932-33.)

6 Finally, Petitioner asserts that the California Supreme Court erred in failing to
7 conduct a comparative juror analysis, and asserts that: "If the CSC [California Supreme
8 Court] had undertaken that form of review, it would have revealed that three of the seated
9 jurors articulated reservations about the death penalty equivalent to those of struck jurors
10 L.H. and Y.M." (Reply at 27.) A comparative juror analysis involves "an examination of
11 a prosecutor's questions to prospective jurors and the jurors' responses, to see whether the
12 prosecutor treated otherwise similar jurors differently because of their membership in a
13 particular group." Boyd v. Newland, 467 F.3d 1139, 1145 (9th Cir. 2004).

14 Petitioner points to the questionnaire and voir dire responses of jurors J.C., K.T.,
15 D.R. and B.E., asserting that these four jurors expressed reservations about the death
16 penalty similar to those articulated by L.H. and Y.M., and the California Supreme Court's
17 failure to engage in this analysis demonstrates "another procedural failing under the clearly
18 established federal law of Miller-El, *supra*." (Reply at 27; see also SAP at 16.) To the
19 extent Petitioner asserts that the California Supreme Court's failure to conduct a
20 comparative juror analysis warrants *de novo* review of his claim, the Ninth Circuit has
21 rejected such a contention. See Jamerson v. Runnels, 713 F.3d 1218, 1224 n.1 (9th Cir.
22 2013) (stating that the Ninth Circuit "has already addressed and rejected" the petitioner's
23 argument that the reviewing court "should review his claim *de novo* because the state
24 courts unreasonably applied clearly established federal law when they declined to conduct
25 a comparative juror analysis."), citing Cook v. LaMarque, 593 F.3d 810, 816 & n.2 (9th
26 Cir. 2010).

27 The Ninth Circuit has held that "[c]omparative juror analysis is an established tool
28 at step three of the Batson analysis for determining whether facially race-neutral reasons

1 are a pretext for discrimination. In addition, comparative juror analysis may be employed
2 at step one to determine whether the petitioner has established a prima facie case of
3 discrimination.” Crittenden, 624 F.3d at 956 (internal and external citations omitted); see
4 also Boyd, 467 F.3d at 1149 (“[B]ecause comparative juror analysis assists a court in
5 determining whether the totality of the circumstances gives rise to an inference of
6 discrimination, we believe that this analysis is called for on appeal even when the trial court
7 ruled that the defendant failed to make a prima facie showing at the first step of the Batson
8 analysis.”)

9 Based on a review of the record, a comparative juror analysis does nothing to
10 undermine the reasonableness of the California Supreme Court’s findings and conclusions,
11 as the voir dire and questionnaire responses of the jurors Petitioner cites do not reveal that
12 those jurors possessed reservations about the death penalty similar to those held by
13 prospective jurors L.H. or Y.M.¹⁰

14 For instance, Petitioner asserts that juror J.C. voiced reservations about capital
15 punishment and “stated that the death penalty should be imposed only in ‘very serious
16 cases,’ such as ‘killing a president.’” (Reply at 27.) Petitioner stated that despite these
17 views, the prosecutor’s questions of that juror were “cursory.” (Id.) A review of the record
18 reveals that Petitioner’s characterization that J.C. stated he would “only” impose death
19 penalty in serious cases such as killing a president misstates both his questionnaire answers
20 and his voir dire responses. To a question posed in the written questionnaire asking: “Are
21 there any circumstances where a person convicted of murder should automatically receive

22
23
24 ¹⁰ Petitioner does not offer a comparative analysis argument with respect to
25 prospective juror M.A., and the record fails to reveal any individual similar to M.A. who
26 served on Petitioner’s jury. Again, as both the prosecutor and Petitioner’s defense counsel
27 expressed concerns about M.A.’s English proficiency and unsuccessfully challenged her
28 for cause, to which the trial court stated that they would have to “deal with that” though
use of a peremptory challenge, the record clearly reflects this was the obvious reason M.A.
was excused from the venire.

1 the death penalty?” J.C. wrote: “In the case of a crime againts [sic] the United States such
2 as the Rosenburgs [sic] spy trial or the killing of a president.” (CT 3701.) As this question
3 clearly asked whether the individual felt any crimes automatically warranted death penalty,
4 a contention that those were the “only” circumstances where he would consider the death
5 penalty is not supported by the record.

6 The record also reflects that the prosecutor’s questions were more than “cursory,” as
7 the prosecutor asked J.C. several questions about his views, including an inquiry into his
8 questionnaire response about when the death penalty was appropriate, and about the juror’s
9 ability to consider and follow the court’s instructions. (RT 1912-14.) During part of the
10 voir dire between the prosecutor and J.C., the juror reviewed his questionnaire at the
11 prosecutor’s behest and explained: “What I meant was I would weigh the evidence and
12 give the death penalty only in the case of a very serious crime. In other words, I wouldn’t
13 do it if some man just robbed a bank; I wouldn’t give him the death penalty unless he might
14 have killed someone in the process. Then I would weigh the evidence and decide what I
15 felt would be -- you know, what I think right for the crime.” (RT 1914.) Given that this
16 juror expressed a written belief that conviction of certain crimes warranted the automatic
17 imposition of the death penalty, that he clarified during voir dire that the death penalty was
18 indeed warranted for serious crimes, and explained that he would not give the death penalty
19 for a bank robbery “unless he might have killed someone in the process,” the Court finds
20 that J.C. did not express “reservations” about the death penalty similar to those raised by
21 L.H. or Y.M.

22 With respect to juror K.T., Petitioner states that she “wrote and affirmed that the
23 decision to impose death is an ‘enormous one’ that causes her ‘trepidation,’ but that the
24 prosecutor again only engaged in ‘cursory’ voir dire of her.” (Reply at 27.) K.T. indicated
25 in her written questionnaire that the decision to impose death was enormous, and wrote:
26 “Unfortunately for me, I’d be a good juror I think, but the idea fills me with trepidation.”
27 (CT 3742.) K.T. also noted that she used to believe the death penalty was unwarranted in
28 any instance, but now believed it was warranted in “certain instances.” (CT 3737-38.)

1 While the prosecutor's questioning of K.T. was brief, it was not "cursory," as he asked if
2 the penalty decision was one she could make, to which she answered affirmatively, and
3 asked if she could decide someone's fate and live with that decision, to which she also
4 answered yes and stated: "I could live with that." (RT 2485.) The Court fails to see
5 similarities between K.T. and either Y.M. or L.H., as K.T. clearly stated that she could
6 impose the death penalty and did not indicate, as L.H. had, that she would have to be "really
7 convinced" to vote for it, nor did she indicate, like Y.M., that she would tend to vote for
8 the "other" rather than the death penalty. While it is apparent that K.T. was reasonably
9 concerned with the gravity of the penalty decision, the Court is not persuaded that she
10 expressed reservations about capital punishment similar to those mentioned by Y.M. or
11 L.H.

12 Petitioner also argues that juror D.R. "stated that the death penalty should be
13 reserved for 'the worst of the worst,'" yet the prosecutor did not conduct any voir dire of
14 that juror. (Reply at 27.) A review of the record reflects that D.R., too, failed to express
15 reservations about the death penalty similar to those voiced by Y.M. or L.H. When D.R.
16 was asked about her views of the death penalty, she stated: "What I really believe is that
17 we have the death penalty, it's parts of our law so it's reserved for certain punishments and
18 it's there and that's what makes our system work. [] So yes, I feel very strongly in that way.
19 I feel very strongly that way; that it's there to be used if the situation warrants the use of
20 the death penalty." (RT 2613.) When asked if the death penalty was used too infrequently,
21 D.R. answered no, and the actual exchange with the court that Petitioner appears to refer
22 to was as follows:

23 Q: Do you think it should be reserved for the very worst of the worst, so
24 to speak?

25 A: It's the worst penalty so I guess, you know, I would feel that way
26 because that's as bad as it can get as a penalty.

27 (*Id.*) Thus, the record does not support a conclusion that D.R. articulated reservations about
28 imposing the death penalty. Indeed, D.R.'s questionnaire responses reveal that her views

1 were actually opposite to those of Y.M. While Y.M. indicated that her reservations about
2 capital punishment stemmed from her deeply held religious beliefs, D.R. wrote in her
3 questionnaire that: “Being a practicing Catholic for the first half of my life I believed that
4 the taking of any life for any reason was wrong. I now feel that for certain crimes there are
5 some who do not deserve to live.” (CT 3643.) The Court fails to find similarities between
6 the views of D.R. and the excused jurors.

7 Finally, juror B.E. stated that the penalty decision “would be an extremely difficult
8 decision to make. But I feel that it’s a decision that would have to be made if the
9 proceedings got to that stage.” (RT 2526.) When B.E. was asked if he could be objective
10 in choosing between the penalty alternatives, he stated: “Yes, I do feel I could be.” (RT
11 2526-27.) A review of the record reflects that B.E., unlike Y.M. or L.H., did not express
12 reluctance or reservations about the possibility of voting for the death penalty. A
13 comparison of Y.M. and L.H. with the non-Hispanic jurors who served do not demonstrate
14 similarity in either answers or views about their ability to vote for the death penalty. As
15 such, Petitioner’s assertion that a comparative analysis demonstrates that the prosecutor
16 treated non-Hispanic jurors with similar reservations about capital punishment differently
17 fails to find support in the record and does not support an inference of discrimination.

18 “The question under AEDPA is not whether a federal court believes the state court’s
19 determination was incorrect but whether that determination was unreasonable— a
20 substantially higher threshold.” Schriro, 550 U.S. at 473, citing Williams, 529 U.S. at 410.
21 Ultimately, as thoroughly discussed above, Petitioner fails to demonstrate that the
22 California Supreme Court’s adjudication of Claim 1 was either contrary to, or an
23 unreasonable application of, clearly established federal law, or that it was based on an
24 unreasonable determination of the facts. Accordingly, Petitioner is not entitled to habeas
25 relief on Claim 1.

26 ///

27 ///

28 ///

2. Claim 2

In this claim, Petitioner asserts that the “trial court erred in refusing to excuse for cause Jurors [R.L., P.G., M.N., S.K., and D.V.] based on the evidence in the trial record that they were so strongly biased in favor of the death penalty that their ability to follow the law was substantially impaired within the meaning of Wainright v. Witt, 469 U.S. 412 (1985).” (SAP at 18.) Petitioner also contends that the trial court erred in excusing prospective jurors R.J. and R.A. for cause based on their feelings against the death penalty. (Id. at 18-19.)

The California Supreme Court considered and rejected this claim on direct appeal in a reasoned opinion, as follows:

Defendant contends the trial court erred in not excusing for cause five prospective jurors who were biased in favor of the death penalty, and in excusing for cause two prospective jurors he asserts were not biased, in violation of *Wainwright v. Witt* (1985) 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 and *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776. Defendant claims the trial court's rulings violated his right to trial by a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution. For the reasons discussed below, we conclude that the trial court did not err in its rulings concerning the for-cause challenges of prospective jurors, and that defendant's constitutional rights were not violated.

1. Denial of Defense's For-cause Challenges

The defense unsuccessfully challenged for cause the following five prospective jurors: R. L., P. G., S. K., M. N., and D. V.^{FN16} The defense later removed Prospective Juror R.L. using a peremptory challenge. Prospective Jurors P. G. and S. K. were chosen to sit as jurors.

FN16. For R. L., S. K., M. N. and D. V., both defendant's trial counsel and Alvarado's trial counsel joined in the for-cause challenges. For P. G., Alvarado's trial counsel made a challenge for cause, but defendant's trial counsel stated he was not challenging P. G. for cause. We do not consider the claim as to P. G. forfeited, however, because failure to object does not forfeit a *Witt/Witherspoon* claim on appeal. (*People v. Schmeck* (2005)

37 Cal.4th 240, 262, 33 Cal.Rptr.3d 397, 118 P.3d 451 (*Schmeck*); *People v. Velasquez* (1980) 26 Cal.3d 425, 443, 162 Cal.Rptr. 306, 606 P.2d 341.) In addition, codefense counsel's challenge for cause alerted the trial judge to the possibility of Witt/ *Witherspoon* error as to P. G. (See *People v. Velasquez*, *supra*, 26 Cal.3d at 444, 162 Cal.Rptr. 306, 606 P.2d 341.)

Preliminarily, the People contend that defendant has forfeited these claims because his trial counsel did not exhaust his peremptory challenges.^{FN17} “To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so.” (Guerra, *supra*, 37 Cal.4th at p. 1099, 40 Cal.Rptr.3d 118, 129 P.3d 321, quoting *People v. Williams* (1997) 16 Cal.4th 635, 667, 66 Cal.Rptr.2d 573, 941 P.2d 752.) Defendant does not dispute the fact that his trial counsel neither exhausted his peremptory challenges nor expressed dissatisfaction with the jury ultimately selected. Rather, he asserts that our discussion in *People v. Johnson*, *supra*, 47 Cal.3d at pages 1220–1221, 255 Cal.Rptr. 569, 767 P.2d 1047, concerning the dynamic nature of the process of exercising peremptory challenges, somehow undermines the exhaustion requirement. Defendant is mistaken. Our discussion in *Johnson* addresses how a party with fewer remaining peremptory challenges might exercise them more sparingly, but this does not relieve defendant of the exhaustion requirement in order to preserve his claim. Alternatively, defendant seeks to justify trial counsel’s failure to exhaust all peremptory challenges by arguing that when counsel accepted the 12 jurors in the box, the venire contained several prospective jurors who may well have been worse than those in the box. Even assuming this argument could justify a failure to exhaust his peremptory challenges, it is mere speculation on this record. Defendant’s contentions of erroneous jury inclusion are therefore forfeited.

FN17. The defense exercised five of 20 available joint peremptory challenges only, and defendant did not exercise any of his five individual peremptory challenges.

Even if he did not forfeit his claims, defendant can show no error with respect to the three prospective jurors who did not sit on the jury, that is, R. L., M. N., and D. V.^{FN18} As to the two jurors who did sit on the jury, P. G. and S. K., as discussed below, the trial court properly denied each of defendant's challenges for cause.

FN18. “To establish that the erroneous inclusion of a juror violated a defendant’s right to a fair and impartial jury, the defendant must show either that a biased juror actually sat on the jury that imposed the death sentence, or that the defendant was deprived of a peremptory challenge that he or she would have used to excuse a juror who in the end participated in deciding the case.” (*People v. Blair* (2005) 36 Cal.4th 686, 742, 31 Cal.Rptr.3d 485, 115 P.3d 1145 (*Blair*), italics omitted.) The defense removed R.L. with a peremptory challenge, but defendant makes no argument that exercising a peremptory challenge on R.L. deprived him of one that he would have used to excuse a juror who participated in deciding the case (and indeed he cannot make such an argument, given the number of his remaining unused peremptory challenges). M.N. and D.V. never even made it into the jury box.

The same analysis applies to claims involving erroneous juror exclusion or inclusion. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 975, 108 Cal.Rptr.2d 291, 25 P.3d 519.) “Applying *Wainwright v. Witt*, *supra*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 ..., we have stated that “[i]n a capital case, a prospective juror may be excluded if the juror’s views on capital punishment would “prevent or substantially impair” the performance of the juror’s duties.’ [Citations.] ‘A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.’ [Citation.]’ In addition, “[o]n appeal, we will uphold the trial court’s ruling if it is fairly supported by the record, accepting as binding the trial court’s determination as to the prospective juror’s true state of mind when the prospective juror has made statements that are conflicting or ambiguous.’ [Citations.]’” (Blair, *supra*, 36 Cal.4th at p. 743, 31 Cal.Rptr.3d 485, 115 P.3d 1145, quoting *People v. Jenkins* (2000) 22 Cal.4th, 900, 987, 95 Cal.Rptr.2d 377, 997 P.2d 1044.)

a. Juror P. G.

During the trial court's voir dire, P. G. stated he would be able to follow the law and procedures in capital cases. He did not believe his feelings either for or against the death penalty would affect his judgment. P. G. told defense counsel he thought the state should reserve the death penalty for the most brutal and severe crimes, but he did not have a specific list of such crimes in mind. P. G. stated that if he found the torture allegation in the conspiracy count

1 to be true, he could impose the death penalty and he would place the burden
2 on the defense in the penalty phase to produce evidence to get him to lean the
3 other way. But in response to the prosecutor's questions, P. G. said he would
4 consider the factors the trial court read when making his determination about
5 the appropriate punishment, and he was not predisposed in the death penalty's
6 favor based on the charges filed against the defendants. The record supports
7 the trial court's conclusion that P. G. did not hold views that would prevent or
8 substantially impair the performance of his duties as a juror. (*Blair, supra*, 36
9 Cal.4th at p. 743, 31 Cal.Rptr.3d 485, 115 P.3d 1145.)

10
11 *b. Juror S. K.*

12 In his responses to the written questionnaire, S. K. indicated he thought
13 there were circumstances, such as a planned murder, where a defendant should
14 receive the death penalty automatically. During voir dire, S. K. confirmed his
15 responses to the questionnaire but acknowledged he made them before the
16 court instructed him about the two options in the penalty phase. S. K. noted
17 that he could separate his personal beliefs and his ability to consider both
18 sentencing options. He stated he would follow the court's penalty instructions,
19 and that he would consider the alternative penalty of life without the
20 possibility of parole. S. K. responded to defense counsel that he understood
21 the trial court's instruction that the law did not have a preference for the death
22 penalty and that its imposition was not automatic. He also stated he would
23 make his decision on penalty after listening to both sides.

24 Although the trial court concluded that S. K. gave equivocal answers,
25 the court was satisfied that S. K. was capable of fulfilling his juror
26 responsibilities. The record supports the trial court's conclusion that S. K. did
27 not hold views that would prevent or substantially impair the performance of
28 his duties as a juror. (*Blair, supra*, 36 Cal.4th at p. 743, 31 Cal.Rptr.3d 485,
115 P.3d 1145.)

29
30 *2. Granting of Prosecution's For-cause Challenges*

31 Defendant asserts the trial court erred in excusing two prospective
32 jurors, R. J., and R. A. for their alleged bias against the death penalty. We
33 discuss each claim below.

34
35 *a. Prospective Juror R. J.*

36 In his written questionnaire, R. J. noted that he was ambivalent about
37

1 the death penalty, but denied having conscientious or other objections to it,
2 and indicated he would not automatically vote for life imprisonment. In his
3 voir dire examination, however, R. J. stated he was biased against the death
4 penalty and would not be able to listen to all the evidence in the penalty phase
5 with an open mind and return a verdict of death. The trial court granted the
6 prosecutor's for-cause challenge to R. J., concluding his ability to sit as a fair
7 and impartial juror was substantially impaired due to his strong beliefs in
8 opposition to the death penalty. The record supports the trial court's
9 conclusion that R. J. held views that would prevent or substantially impair the
10 performance of his duties as a juror. (*People v. Schmeck, supra*, 37 Cal.4th at
11 p. 262, 33 Cal.Rptr.3d 397, 118 P.3d 451.) Even if his statements are
12 considered conflicting or equivocal, the trial court's determination of each
13 juror's true state of mind is binding on us. (*Ibid.*)

14 *b. Prospective Juror R. A.*

15 In his written questionnaire, R. A. expressed equivocal views about the
16 death penalty. During the trial court's voir dire, R. A. stated that his feelings
17 in opposition to capital punishment would not affect his judgment, and that he
18 was capable of keeping an open mind in order to impose a just punishment.
19 But during defense counsel's questioning, R. A. observed that he did not think
20 he was ready to pass judgment in a capital case. In response to the prosecutor's
21 voir dire, R. A. stated he would not impose the death penalty on a first time
22 murderer with special circumstances. He did observe that if a murderer were
23 to kill again after having been given a chance to rehabilitate, the death penalty
24 might be appropriate.

25 The prosecutor challenged R. A. for cause because he apparently would
26 not impose death on first-time murderers. The court granted the prosecutor's
27 challenge. We find that the record supports the court's conclusion that R. A.'s
28 views would prevent or substantially impair his ability to perform his juror
duties. (*Schmeck, supra*, 37 Cal.4th at p. 262, 33 Cal.Rptr.3d 397, 118 P.3d
451.)

29
30 Hoyos, 41 Cal. 4th at 903-07 (brackets in original).

31 “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel
32 of impartial, ‘indifferent’ jurors.” Irvin v. Dowd, 366 U.S. 717, 722 (1961). “[T]he proper
33 standard for determining when a prospective juror may be excluded for cause because of
34 his or her views on capital punishment . . . is whether the juror's views would ‘prevent or

1 substantially impair the performance of his duties as a juror in accordance with his
2 instructions and his oath.”” Wainwright v. Witt, 469 U.S. 412, 424 (1985), quoting Adams
3 v. Texas, 448 U.S. 38, 45 (1980).

4 The Supreme Court has stated that “whether a venireman is biased has traditionally
5 been determined through *voir dire* culminating in a finding by the trial judge concerning
6 the venireman’s state of mind. We also noted that such a finding is based upon
7 determinations of demeanor and credibility that are peculiarly within a trial judge’s
8 province. Such determinations were entitled to deference even on direct review; “[t]he
9 respect paid such findings in habeas proceeding certainly should be no less.”” Witt, 469
10 U.S. at 428, quoting Patton v. Yount, 467 U.S. 1025, 1038 (1984) (footnote omitted)
11 (bracket in original); see also Uttecht v. Brown, 551 U.S. 1, 9 (2007) (“Deference to the
12 trial court is appropriate because it is in a position to assess the demeanor of the venire,
13 and of the individuals who compose it, a factor of critical importance in assessing the
14 attitudes and qualifications of potential jurors.”)

15 Even if the Court assumes, without deciding, that Petitioner preserved this claim
16 despite his failure to either exhaust his allotment of peremptory challenges or object to the
17 ultimate composition of the jury, it is clear, for the following reasons, that the California
18 Supreme Court’s rejection of this claim was reasonable and the trial court’s conclusions
19 find ample support in the state record. See Witt, 469 U.S. at 434 (“[T]he question is not
20 whether a reviewing court might disagree with the trial court’s findings, but whether those
21 findings are fairly supported by the record.”), citing Marshall v. Lonberger, 459 U.S. 422,
22 432 (1983).

23 **A. Jurors P.G. and S.K.**

24 Of the five venire members at issue in this aspect of the claim, only P.G. and S.K.
25 sat on Petitioner’s jury. (CT 3516.) Petitioner explains that he “cites the trial court’s error
26 as to R.L., M.N., and D.V. to show that the trial court had an incorrect standard for
27 determining defense challenges for cause, and made multiple errors in accordance with that
28 erroneous standard,” and asserts that “[t]he prejudice comes from the fact that P.G. and

1 S.K. who were removable for cause did sit on the jury ‘as finally composed.’” (Pet. Brief
2 at 7.) The Court’s review will center on the impartiality or bias of P.G. and S.K., the two
3 individuals who actually sat on Petitioner’s jury. See Dyer v. Calderon, 151 F.3d 970, 973
4 (9th Cir. 1998) (en banc) (“The Sixth Amendment guarantees criminal defendants a verdict
5 by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate
6 [Petitioner’s] right to a fair trial.”); see also Ross v. Oklahoma, 487 U.S. 81, 86 (1988)
7 (“Any claim that the jury was not impartial, . . . must focus . . . on the jurors who ultimately
8 sat.”)

9 Petitioner argues that Juror P.G. was biased because he indicated that if he found
10 Petitioner guilty of murder and torture, he would lean towards the death penalty and place
11 the burden on the defense to show that life in prison was warranted instead of the death
12 penalty. (SAP at 20-21; Reply at 33.) Defense counsel challenged P.G. for cause “based
13 on after finding a defendant guilty of murder, he would lean towards the death penalty,”
14 and argued that “he’s the type of juror that would put the burden on the defense.” (RT
15 1919.) The trial court indicated that he would review the transcript before deciding on the
16 challenge to P.G. (RT 1920.) The trial court later denied defense counsel’s challenge for
17 cause, finding P.G. was one of a group of jurors who “in many cases gave equivocal
18 answers, but I am satisfied and comfortable that each of these jurors is capable of fulfilling
19 they’re [sic] responsibility as far as being fair and impartial, notwithstanding any feelings
20 they have concerning the topics covered orally or in writing.” (RT 2006, 2645.) P.G.
21 served on Petitioner’s jury. (RT 2645; CT 3516.)

22 A review of the trial record reveals that while P.G. agreed he would “lean” towards
23 the death penalty if he found Petitioner guilty and found a torture allegation to be true,
24 counsel’s questioning also resulted in the following exchange in which P.G. clearly
25 indicated that he would evaluate the case on the evidence presented:

26 Q. If that were your leaning, do you think there would be anything I could
27 say or do that would get you to lean the other way or lean straight up?

28 ///

1 A. Well, I would have to judge it on the evidence presented which way I
2 would be leaning.

3 (RT 1909.) Meanwhile, earlier questioning by the trial court confirmed P.G.’s ability and
4 willingness to follow the law regardless of his own personal feelings:

5 Q. Now you have heard me go over, at least on two occasions, some of the
6 rules of law that apply to capital cases. Do you feel capable of
7 following the law and the procedures that I have outlined for you?

8 A. Yes, your Honor.

9 Q. Would your feelings either for or against the death penalty in any way
10 affect your judgment in this case?

11 A. I do not believe so.

12 (RT 1878.)

13 Based on a review of the entirety of the voir dire and giving deference to the judge
14 as required, it is clear that the trial court’s conclusion, that P.G. was able to be fair and
15 impartial despite his personal views, is “fairly supported” by the record. As such, the
16 California Supreme Court was not unreasonable in similarly concluding that: “The record
17 supports the trial court’s conclusion that P.G. did not hold views that would prevent or
18 substantially impair the performance of his duties as a juror.” Hoyos, 41 Cal. 4th at 905-
19 06.

20 With respect to Juror S.K., Petitioner relies largely on the written responses in the
21 juror questionnaire, in which S.K. answered yes to a question asking if every person who
22 committed a first-degree murder should automatically receive the death penalty, and wrote
23 that he viewed the death penalty as a punishment rather than a deterrent. (SAP at 21, citing
24 CT 3756, 3758.) Petitioner contends that S.K. restated those same beliefs during voir dire.
25 (SAP at 21; Reply at 32.) When defense counsel challenged S.K. for cause, the trial court
26 stated: “If one were simply looking at the questionnaire, there wouldn’t be any question
27 about whether he is substantially impaired. But my notes cause me to think that that was
28 clarified by oral testimony.” (RT 2006.) The trial court held a decision about S.K. in

1 abeyance pending a review of the transcript. (Id.) After that review, the trial court declined
2 to excuse S.K., recognizing that juror, like P.G., was part of a group who “in many cases
3 gave equivocal answers, but I am satisfied and comfortable that each of these jurors is
4 capable of fulfilling they’re [sic] responsibility as far as being fair and impartial,
5 notwithstanding any feelings they have concerning the topics covered orally or in writing.”
6 (RT 2645.) S.K. was seated on Petitioner’s jury. (CT 3516.)

7 Upon review of the voir dire exchanges, it is apparent that the trial court’s decision
8 was supported by the record, as S.K. clearly stated that he could be objective and would
9 listen to both sides before making a decision, as well as indicated that his questionnaire
10 answers were made prior to the trial court’s instructions on the penalty decision, as follows:

11 Q. According to your answers there were a couple of questions I wanted
12 to follow-up on.

13 Looking at question 70, the question is: “Do you feel that every
14 person who commits first degree murder should automatically receive
15 the death penalty?

16 And your response was: “If you take someone’s life, then they
17 have” - - I can’t read it exactly, but they have a right to expect justice,
18 something along those lines.

19 Would that be your present state of mind?

20 A. I was trying to, without the instructions of the two ways to go - - yeah,
21 that is how I believe.

22 Q. Okay.

23 A. But I also tried to make it clear that I do think I can be objective also.

24 (RT 1940.) Upon additional query about his questionnaire response concerning automatic
25 death penalty for planned murders, S.K. clarified that: “I tried to make a distinction and
26 my personal beliefs are that the death penalty is something that needs to be implemented.
27 But I also tried to take that if I was instructed that there are now two choices and you have
28 to take the aggravating and mitigating circumstances, that I would also be able to do that.”

1 (RT 1963.) When asked if he believed the death penalty should be a punishment option,
2 S.K. replied, “Absolutely.” (Id.) When asked if he could consider an alternative sentence
3 of life without parole, he also stated: “Yes, Absolutely.” (Id.) Counsel and S.K. then had
4 the following exchange:

5 Q. And do you accept what the judge has told you so far, that the law has
6 no preference for the death penalty, that it is not automatic, no matter what?

7 A. I understand that completely.

8 (RT 1964.) After additional questions, S.K. again affirmed that: “I’m going to listen to
9 both sides, make a decision from there.” (RT 1975.)

10 Here too, based on the Court’s review of the whole record, it is evident that the trial
11 court’s decision, made after acknowledging and considering both S.K.’s questionnaire
12 responses as well as his answers during voir dire, is “fairly supported” by the record.
13 Accordingly, the California Supreme Court reasonably concluded that: “Although the trial
14 court concluded that S. K. gave equivocal answers, the court was satisfied that S. K. was
15 capable of fulfilling his juror responsibilities. The record supports the trial court’s
16 conclusion that S. K. did not hold views that would prevent or substantially impair the
17 performance of his duties as a juror.” Hoyos, 41 Cal. 4th at 906.

18 B. Prospective Jurors R.J. and R.A.

19 Petitioner also contends that he was deprived of his right to a fair and impartial jury
20 when the trial court erroneously excused prospective jurors R.J. and R.A. based on their
21 views concerning the death penalty. (SAP at 18-19.) Petitioner states “that conclusion is
22 refuted by the record,” argues that the state court unreasonably applied Witt, and asserts
23 that “[t]he erroneous excusal of otherwise qualified jurors is prejudicial error requiring
24 reversal of the judgment.” (Id., citing Gray v. Mississippi, 481 U.S. 648 (1987).)

25 “[A] sentence of death cannot be carried out if the jury that imposed or recommended
26 it was chosen by excluding veniremen for cause simply because they voiced general
27 objections to the death penalty or expressed conscientious or religious scruples against its
28 infliction.” Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). Again, “the proper standard

1 for determining when a prospective juror may be excluded for cause because of his or her
2 views on capital punishment . . . is whether the juror's views would 'prevent or
3 substantially impair the performance of his duties as a juror in accordance with his
4 instructions and his oath.'" Witt, 469 U.S. at 424, quoting Adams, 448 U.S. at 45. "The
5 nature of the jury selection process defies any attempt to establish that an erroneous
6 Witherspoon-Witt exclusion of a juror is harmless." Gray, 481 U.S. at 665.

7 A review of the state record supports the trial court's decision to excuse these two
8 individuals for cause. In his questionnaire, R.J. indicated that he felt "somewhat
9 ambivalent," but did not hold views strongly objecting to the death penalty that would
10 render him unable to vote for it, nor would he automatically vote for life in prison. (CT
11 5484.) Petitioner concedes that R.J. "somewhat contradicted" his questionnaire responses
12 during later voir dire questioning. (SAP at 27.) When directly asked about his views, R.J.
13 indicated that he was against the death penalty, as follows:

14 Q. Now so far as capital punishment is concerned, how do you fit into this
15 spectrum of people who have strong feelings for or against capital
16 punishment?

17 A. I have to say that I have feelings against capital punishment.

18 Q. All right. You describe your feelings to some extent in response to
19 question number 63. Do you feel that your feelings are strong to the
20 point that they may affect your judgment in the case so far as penalty is
concerned?

21 A. I think that they are, yes. It's a very tough question. I understand, as I
22 indicated in my answer, I understand the - - I think I understand the
23 motivation for having the death penalty. I just don't see that it
accomplishes anything.

24 So I would have to say that I am biased against it, and it probably
25 would affect my judgment in the penalty phase of the trial.

26
27 (RT 1879.) Following these questions, R.J. then expressly and clearly stated his inability
28 to vote for the death penalty:

1 Q. Are you capable of listening to all evidence presented in a penalty phase
2 with an open mind, and if, in fact, it were your belief that the evidence
3 in aggravation so outweighed the evidence in mitigation, that death
4 was, in fact, warranted, would you be capable under most
circumstances of returning a verdict of death?

5 A. I don't think that I would be. Honestly, I don't think that I would be.

6 (RT 1880.)

7 Counsel attempted to rehabilitate R.J., noting that many people leaned one way or
8 another on the issue of capital punishment and that they sought those individuals who could
9 consider both penalties and keep an open mind. When counsel asked: "Do you think your
10 bias is so strong that that is impossible for you to do?", R.J. replied: "I believe that it - - I
11 believe that it is. I mean I guess it sounds like I am on some kind of crusade or something.
12 I mean I have never really had to evaluate this death penalty question. Now that the chips
13 are sort of down, so to speak, looking at it honestly I just don't think that I could sentence
14 someone to death because I just don't see that it serves a purpose beyond vengeance. Lock
15 them up, throw away the key, that's my attitude towards it. And I have to state it as such,
16 I can't --" (RT 1893-94.) When asked once more if he could apply the law as instructed
17 despite his feelings on the matter, R.J. replied, "I think not." (RT 1894-95.)

18 In response to the prosecutor's challenge for cause, the trial court discussed R.J. at
19 length and in detail, stating that he found R.J. to be "a very thoughtful and candid
20 individual," recalling that R.J. paused before his answers and clearly "gave thought" to his
21 responses, and concluding that "based upon what he said and the way he said it, I don't
22 have any question in my mind that he holds strong beliefs in opposition to the death penalty
23 that would prevent him from following the law. He said so repeatedly. And I think his
24 ability to sit as a fair and impartial juror is substantially impaired as a result of those
25 beliefs." (RT 1921.)

26 As the trial court's conclusions were "based upon determinations of demeanor and
27 credibility that are peculiarly within a trial judge's province," they are entitled to deference.
28 Witt, 469 U.S. at 428. The California Supreme Court affirmed this decision accordingly,

1 holding that the record supported the juror's exclusion and reasonably concluding that
2 "[e]ven if his statements are considered conflicting or equivocal, the trial court's
3 determination of each juror's true state of mind is binding on us." Hoyos, 41 Cal. 4th at
4 906-07.

5 In the questionnaire, R.A. wrote that "death penalty is sometimes good, sometimes
6 it is a bad idea to punish a person who committed a serious crime. I say it's bad because
7 killing people is a sin. We should give them a chance to live and hope that they will change.
8 [¶] But if they won't change and start killing people again I believe death penalty is the
9 best penalty they should get." (CT 4592.) R.A. explicitly indicated in his questionnaire
10 that he had an objection to the death penalty, referred back to his earlier written answer
11 multiple times, and also answered "yes" to a question asking if his opinion were such that
12 he would be "unable to impose the death penalty regardless of the facts." (CT 4593.) Voir
13 dire exchanges only further confirmed R.A.'s views. When asked if he could return a
14 verdict of death or whether his views would affect his judgment on the issue, R.A. stated:
15 "I don't know, sir. I am not sure." (RT 2282.) R.A. and counsel later had the following
16 exchange:

17 Q. What is that that you are concerned about?

18 A. On this case, you know, I don't think I'm ready for this to make a
19 decision since like capital crime right now, I don't think, you know, I
20 can give you some judgment.

21 (RT 2302.) R.A. later reiterated his questionnaire response that he condoned the death
22 penalty only under very narrow circumstances, as follows:

23 Q. And when you write killing people is a sin, do you also mean that if you
24 have to make a decision as to whether somebody lives or dies and you
25 choose and you vote that a person should die, that that would be a sin?

26 A. Well, if it's appropriate to kill a murderer and to stop him from killing
27 again, I think the death penalty should be necessary.

28

1 (RT 2334.) When counsel attempted to clarify R.A.'s views, R.A. again reiterated these
2 beliefs:

3 Q. In other words, you are going to be asked in the second trial whether or
4 not the defendants should live or die. You are either going to vote for
5 death or you are going to vote for life in prison without parole. [¶] Could you vote for the death penalty if there is no evidence that they
6 have killed before?

7 A. Well, if they are convicted for murder you should at least give them a
8 chance to live and give them a chance to change. Maybe, you know,
9 they will regret for what they have done. So I think it's just necessary
to - -

10 (RT 2335.) Ultimately, R.A. clearly stated that he would not impose the death penalty
11 unless a murderer had killed again, after being given a chance at rehabilitation:

12 Q. So you don't believe or you do believe that the first time someone
13 would be convicted of murder with special circumstances, they should
14 automatically be given a chance to rehabilitate themselves or make
something of themselves even though they may spend time in prison?

15 A. Right.

16 Q. And you would not at any time impose the death penalty?

18 A. No.

19 Q. But if they were to kill again after given a chance, then you would say,
20 okay, I think the death penalty might be appropriate?

21 A. Right.

23 (RT 2335-36.) The trial court later excused R.A. as part of a group of prospective jurors
24 that "as far as this Court's opinion is concerned, are substantially impaired by virtue of
25 their feelings concerning the various topics that are raised in the questionnaire and orally
26 to the point that they would not be in a position to sit fairly and impartially and render a
27 judgment in this case in accord with the Courts [sic] instructions on the law." (RT 2645.)
28 In light of R.A.'s statements, both in the questionnaire and during voir dire itself, that he

1 held strong objections to the death penalty that would impair his ability to impose such a
2 punishment, and specifically that he would not impose the death penalty for murder unless
3 the individual had killed before, the trial court reasonably found R.A. to be substantially
4 impaired. The California Supreme Court reasonably concluded that “the record supports
5 the court’s conclusion that R. A.’s views would prevent or substantially impair his ability
6 to perform his juror duties.” Hoyos, 41 Cal. 4th at 907. In both instances, “[t]he trial
7 court’s finding of bias was made under the proper standard, was subject to § 2254(d), and
8 was fairly supported by the record.” Witt, 469 U.S. at 435.

9 The record amply supports the trial court’s conclusions with respect to Jurors P.G.
10 and S.K. Accordingly, Petitioner fails to demonstrate that the state supreme court’s
11 rejection of Claim 2 was either contrary to, or an unreasonable application of, clearly
12 established federal law, or that it was based upon an unreasonable determination of the
13 facts. Relief is not warranted on Claim 2.

14 **3. Claim 3**

15 Petitioner asserts that the trial court erred when it “refused to instruct the jurors as
16 requested by the defense that they have a civic duty to serve as jurors and to subordinate
17 their personal views regarding the death penalty and other matters to their duty to follow
18 the law,” as outlined in Witherspoon, 391 U.S. at 522. (SAP at 30.)

19 The California Supreme Court considered and rejected this claim in a reasoned
20 opinion on direct appeal, as follows:

21 Defendant contends the trial court erred when it denied his motion in
22 limine requesting the court to admonish prospective jurors of their civic duty
23 to serve as jurors, and to set aside their personal views as to that duty in order
24 to follow the law. Defendant claims the trial court’s denial of his motion
25 contributed to the improper dismissal of qualified jurors, and violated his right
26 to an impartial jury, due process, and equal protection of the laws under the
27 Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
28 He further claims the trial court erred by excusing prospective jurors for cause
without first so admonishing them.^{FN19} Defendant concedes that we have
consistently held “a ‘civic duty’ admonition is not necessary,” and apparently
asks us to reconsider the issue. (*People v. Gordon* (1990) 50 Cal.3d 1223,

1 1261, 270 Cal.Rptr. 451, 792 P.2d 251.) We decline to do so and find no error
2 under these facts.

3 FN19. Defendant argues a “civic duty” admonition might
4 have “salvaged” six prospective jurors excused for cause: R. J.,
5 L. S., N. W., P. K., A. U., and R. A. As an initial matter, we note
6 that the goal of voir dire is not to “salvage” problematic jurors,
7 but rather to find 12 fair-minded jurors who will impartially
8 evaluate the case. In the previous section, defendant claimed that
9 two of these six prospective jurors (R. J. and R. A.) were excused
10 in violation of *Witherspoon* and *Witt*. But defendant does not
11 appear to claim that the remaining four jurors (L. S., N. W., P.
12 K., and A. U.) were also excused in violation of *Witherspoon* and
13 *Witt*. In any event, we have reviewed the voir dire of these other
14 four jurors, and we conclude the record supports the trial court’s
15 findings that these jurors held views that would prevent or
16 substantially impair the performance of their duties.

17 Hoyos, 41 Cal. 4th at 907-08.

18 Petitioner argues that “[t]he California Supreme Court’s rejection of this claim was
19 an unreasonable application of Witherspoon and its progeny.” (SAP at 31.) Respondent,
20 meanwhile, points out that the California Supreme Court has repeatedly rejected this claim.
21 (Ans. Mem. at 21, citing People v. Gordon, 50 Cal. 3d 1223, 1261 (1990) and People v.
22 Hamilton, 48 Cal. 3d 1142, 1166 n.5 (1989).) Petitioner argues that “[t]here may not be
23 settled law imposing a *sua sponte* duty to give a specific instruction, but there is settled
24 law, cited by petitioner, that precludes the discharge of a prospective juror unless the juror’s
25 views regarding the death penalty substantially impaired his ability to serve within the
26 meaning of Wainwright v. Witt, 469 U.S. 412 (1985).” (Pet. Brief at 8.) Petitioner relies
27 on Boulden v. Holman, 394 U.S. 478 (1969), for the proposition that “[i]t is entirely
28 possible that a person who has ‘a fixed opinion against’ or who does not ‘believe in’ capital
punishment might nevertheless be perfectly able as a juror to abide by existing law— to
follow conscientiously the instructions of a trial judge and to consider fairly the imposition
of the death sentence in a particular case.” Id. at 483-84.

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1 Petitioner's jury venire was instructed that the parties were entitled to a panel of fair
2 jurors who could consider the case based only on the evidence presented at trial, and could
3 fairly consider both potential penalties, as follows:

4 Both the prosecution and the defendants are entitled to a jury comprised
5 of 12 fair-minded people from our community who can decide the question
6 about the defendants' guilt or innocence based only on the sufficiency of
7 evidence produce [sic] only at the trial and irrespective of what the
consequences of that decision might be.

8 If the jury finds the defendants guilty and the second phase is reached,
9 jurors must be willing to consider fairly both the circumstances of the crime
10 and a defendant's background before deciding between death as a possible
punishment and life without the possibility of parole as a possible punishment.

11 (RT 1677-78, 1716-17, 1753.)

12 Now, we know that some citizen's [sic] favor the death penalty so
13 strongly that they would automatically or almost automatically impose a death
14 penalty for every murder or every murder with special circumstances,
15 regardless of the facts of the crime or of a defendant's background. [¶] We
16 also know that some citizen's [sic] are against the death penalty and have such
17 strong feelings and opposition to the death penalty that they would
18 automatically or almost automatically vote against the death penalty no matter
what the crime or the defendant's background. [¶] Now, neither of these
opinions is necessarily wrong, but I can tell you this; it would be wrong for
people with these opinions to sit as a juror on a death penalty case.

19 (RT 1678-79, 1717-18, 1754.) It is clear that the prospective jurors were properly advised
20 that they were expected to consider the case based only on the evidence presented at trial
21 and that it would be improper for an individual to sit as a juror on the case who held such
22 strong feelings either for or against the death penalty that they would impose or refuse to
23 impose the death penalty regardless of the circumstances of the crime or the characteristics
24 of the defendant.

25 While it is entirely reasonable that a person who has serious reservations about the
26 death penalty may be able to follow a trial court's instructions and consider such a potential
27 punishment, Petitioner has not demonstrated that a "civic duty" instruction is necessary to
28 this end. He also fails to cite to any clearly established Federal law requiring such an

1 instruction. Petitioner generally argues that had the trial court given a civic duty
2 instruction, six prospective jurors that were excused for cause “may well have responded
3 to the court’s questionings in a manner that precluded any excusal for cause.” (SAP at 31.)
4 Petitioner’s speculative assertions fail to demonstrate that the trial court’s decision not to
5 specifically admonish the jurors about their civic duty to serve amounted to error of a
6 constitutional dimension.

7 The state court’s rejection of this claim was neither contrary to, or an unreasonable
8 application of, clearly established federal law, nor was it based upon an unreasonable
9 determination of the facts. Petitioner is not entitled to habeas relief on Claim 3.

10 **4. Claim 4**

11 In this claim, Petitioner contends that the “trial court erroneously denied the defense
12 motion to conduct individual sequestered voir dire of the prospective jurors in order to
13 effectuate a Sixth Amendment guarantee to an impartial jury, Duncan v. Louisiana, 391
14 U.S. 145 (1968), particularly with respect to the jurors’ responses regarding the death
15 penalty.” (SAP at 32.)

16 Petitioner raised this claim on direct appeal, and the state supreme court denied it in
17 a reasoned opinion, as follows:

18 Defendant claims the trial court erred in denying his motion for
19 individual and sequestered juror voir dire, and thus violated his right to trial
20 by an impartial jury and to due process of law under the Sixth and Fourteenth
21 Amendments to the United States Constitution. As we explain, we conclude
the trial court did not err in denying his motion.

22 Alvarado filed an in limine motion, in which defendant joined, seeking
23 individual and sequestered juror voir dire. The trial court denied the motion,
24 but left open the possibility of individual and sequestered voir dire for
particular jurors on a showing of good cause. Subsequently, the court stated it
intended to call 12 prospective jurors at a time for voir dire, followed by
discussion of challenges for cause outside the jurors’ presence. Defendant’s
trial counsel stated he had no objection to the court’s proposed jury selection
procedures.

28 ///

1 As an initial matter, the People contend that counsel's acquiescence in
2 the trial court's proposed jury selection process bars defendant's claim
3 concerning individual and sequestered voir dire. But the parties stipulated that
4 when the trial court made a ruling on an in limine motion, the losing party was
5 not required to restate the objection in order to preserve it for appellate
purposes (assuming that no evidence later presented changed the basis of the
trial court's ruling). Defendant therefore did not forfeit his contention.

6 Defendant's claim fails on the merits, however, because, as defendant
7 concedes, Code of Civil Procedure section 223, enacted as part of Proposition
8 115, abrogated the former individual voir dire procedure directed by *Hovey v.*
Superior Court (1980) 28 Cal.3d 1, 80, 168 Cal.Rptr. 128, 616 P.2d 1301.
(People v. Waidla (2000) 22 Cal.4th 690, 713, 94 Cal.Rptr.2d 396, 996 P.2d
46, citing *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1171,
71 Cal.Rptr.2d 91.) Defendant submits that *Covarrubias* was wrongly
decided, and apparently invites us to reconsider the issue. We decline to do
so. (*People v. Ramos* (2004) 34 Cal.4th 494, 512, 21 Cal.Rptr.3d 575, 101
P.3d 478.)

14 Hoyos, 41 Cal. 4th at 898-99.

15 As previously discussed with respect to the Teague bar (see section III.B.1, supra),
16 the United States Supreme Court has never held that individual, sequestered voir dire is
17 mandated in a capital criminal trial. Instead, the Supreme Court has stated that “[v]oir dire
18 ‘is conducted under the supervision of the court, and a great deal must, of necessity, be left
19 to its sound discretion.’” Morgan v. Illinois, 504 U.S. 719, 729 (1992), quoting Ristaine
20 v. Ross, 424 U.S. 589, 594 (1976) (bracket in original); see also Mu’Min, 500 U.S. at 427
21 (“[O]ur own cases have stressed the wide discretion granted to the trial court in conducting
22 *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to
23 show juror bias.”) Current California state law, that was also in effect at the time of
24 Petitioner’s trial, clearly holds that “[v]oir dire of any prospective jurors shall, where
25 practicable, occur in the presence of the other jurors in all criminal cases, including death
26 penalty cases.” Cal. Code Civ. Proc. § 223.

27 The Supreme Court has also acknowledged “part of the guarantee of a defendant’s
28 right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.” Morgan,

1 504 U.S. at 729. Here, Petitioner fails to show that the trial court's decision not to conduct
2 individual, sequestered voir dire rendered the process somehow inadequate in his case. A
3 review of the record shows that the prospective jurors completed lengthy written
4 questionnaires which contained and included numerous questions about their views on the
5 criminal justice system and capital punishment in particular. The trial court conducted
6 follow-up questioning in "small groups" of twelve individuals. (See CT 3467, 3479; RT
7 1791.) The prospective jurors were advised that they could ask to address certain topics or
8 matters in private if needed and counsel was also provided with an opportunity to question
9 the prospective jurors. After reviewing the record, it is clear that this procedure allowed
10 the parties and the trial court to determine whether any prospective jurors held opinions so
11 strong that they could not be fair to both sides, and would either always impose, or could
12 never impose, a death sentence. In light of the thorough jury selection process employed
13 by the trial court, there is no indication that Petitioner was deprived of his right to an
14 impartial jury.

15 Given that the Supreme Court has never articulated the rule Petitioner advances, and
16 after reviewing the record of the voir dire proceedings, Petitioner fails to demonstrate that
17 the California Supreme Court's rejection of this claim was either contrary to, or an
18 unreasonable application of, clearly established federal law and was not based on an
19 unreasonable determination of the facts. Habeas relief is not warranted on Claim 4.

20 **B. Claims of Trial Court Error**

21 **1. Claim 5**

22 Petitioner alleges that the trial court's refusal to sever his trial from that of co-
23 defendant Alvarado's trial violated his constitutional rights to due process, to testify and to
24 a fair trial. (SAP at 35.)

25 The California Supreme Court considered this claim on direct appeal, denying it in
26 a reasoned opinion as follows:

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1 Defendant asserts that the trial court's denial of his severance motion
2 violated his rights to due process of law, a fair trial, a reliable sentence, and
3 the right to testify on his own behalf, in violation of the Fifth, Sixth, Eighth,
4 and Fourteenth Amendments to the United States Constitution. As discussed
5 below, we conclude the trial court did not err in denying the severance motion.

6 *1. Statements of the Jailhouse Informants*

7 Several of defendant's claims on appeal, including the severance claim,
8 relate to jailhouse informants George Jimenez and Jorge Flores and their
9 statements. Neither Jimenez nor Flores testified at trial.

10 *a. George Jimenez*

11 Following defendant's and Alvarado's arrest after the car stop,
12 Alvarado was incarcerated in the county jail. On May 30, 1992, Alvarado
13 (under the alias "Ralph Varela") was in a holding cell with several other
14 inmates, including George Jimenez. In an interview on June 23, 1992, Jimenez
15 told police the inmates were passing around a newspaper that included a story
16 about the Magooon murders. While looking at the newspaper, Alvarado stated,
17 "Hey, we did this." One of the other inmates said, "You're the ones that
18 capped that little kid?" Alvarado laughed and replied, "Yeah." Enraged by
19 Alvarado's admission, some of the inmates assaulted Alvarado.

20 *b. Jorge Flores*

21 On the same day as Alvarado's jailhouse assault, defendant was
22 incarcerated in a different jail, where he spoke with an acquaintance, Jorge
23 Flores. The next day, June 1, 1992, during an interview with police detectives,
24 Flores stated defendant told him he had taken a pistol that belonged to a
25 shooting victim. Defendant told Flores that he and an unnamed companion
26 were sent by their boss to the victims' house to either get back the marijuana
27 their boss had sold to the victims or get the money the victims owed for it.
28 Defendant stated that when they went to the victims' house the victims were
 not there, but when the victims arrived, the male victim saw they were waiting
 for him, and the victims went inside the house. Defendant and his companion
 knocked on the door; the door opened, or was broken down, and the male and
 female victims were inside holding weapons. The companion pulled his gun
 and shot one of the victims, and the bullet also hit one of the children in the
 head. The second victim tried to shoot, and defendant shot the second victim.

2. Aranda/Bruton Issues

Defendant and Alvarado moved to sever the trial on the ground that the prosecution's proposed admission of the jailhouse informants' testimony would violate *People v. Aranda* (1965) 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265 and *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. *Bruton* and its progeny provide that if the prosecutor in a joint trial seeks to admit a nontestifying codefendant's extrajudicial statement, either the statement must be redacted to avoid implicating the defendant or the court must sever the trials. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 43, 17 Cal.Rptr.3d 710, 96 P.3d 30.) As to the Flores statement, the prosecution resolved any potential *Aranda/Bruton* issues when it limited its evidence to defendant's admission that he had taken a gun from the victim. As to the Jimenez statement, the prosecutor offered several possible redactions to avoid violating *Aranda/Bruton*, all of which the court ultimately deemed inadequate. The prosecutor then elected to proceed with a joint trial at which he would not introduce the Jimenez statement in his case-in-chief, although the parties understood it might be used for impeachment purposes. The trial court's final order was that the prosecution would not use the Jimenez statement in its case-in-chief at the guilt or penalty phases.

Section 1098 expresses a legislative preference for joint trials. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40, 17 Cal.Rptr.3d 710, 96 P.3d 30.) A trial court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*Id.* at p. 41, 17 Cal.Rptr.3d 710, 96 P.3d 30.) But even if the ruling on a severance motion was correct when made, the reviewing court will reverse the decision if a defendant shows that joinder actually resulted in "gross unfairness," amounting to a denial of due process. (*People v. Johnson* (1988) 47 Cal.3d at p. 576, 590, 253 Cal.Rptr. 710, 764 P.2d 1087.)

Because the trial court decided the severance motion entirely on *Aranda* and *Bruton* grounds, and because defendant does not claim the trial court erred in that ruling, he appears to concede the trial court's denial of the severance motion was correct. Defendant contends, however, that the court committed prejudicial error when it left open the possibility that if Alvarado testified, Jimenez could be called to impeach him. Defendant claims that because the trial court did not bar Jimenez's testimony altogether, the denial of severance resulted in gross unfairness amounting to a violation of due process. But defendant's claim that the trial court erred in not barring Jimenez's testimony altogether on *Aranda* and *Bruton* grounds is not viable. A codefendant's

1 extrajudicial statement implicating another defendant need not be excluded
2 when the codefendant testifies and is available for cross-examination.^{FN11}
3 (*Nelson v. O'Neil* (1971) 402 U.S. 622, 629–30, 91 S.Ct. 1723, 29 L.Ed.2d
222; *People v. Boyd* (1990) 222 Cal.App.3d 541, 562–63, 271 Cal.Rptr. 738.)

4 FN11. Defendant bases his claim that he suffered gross
5 unfairness because Jimenez's testimony was not excluded
6 altogether on his argument (discussed and rejected in pt. IV. F.,
7 *post*) that he suffered a *Brady* violation because the prosecutor
8 made a late disclosure of evidence that undermined Jimenez's
9 credibility. (*Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct.
10 1194, 10 L.Ed.2d 215 (*Brady*).) But because defendant's *Brady*
11 claim fails, so too does his derivative claim that the trial court's
12 denial of severance later resulted in gross unfairness in the form
13 of the alleged *Brady* violation.

14 Hoyos, 41 Cal. 4th at 894–96. The state supreme court also rejected Petitioner's contention
15 that the trial court's ruling resulted in prejudice with respect to his penalty phase
16 proceedings. See id. at 927 fn. 38 ("Because we discern no error in any area of the guilt
17 phase, we reject defendant's claims of any prejudicial effect in the penalty phase arising
18 from these or any other guilt phase rulings.")

19 Federal habeas relief is unavailable based on alleged errors of state law unless such
20 error violated a petitioner's federal constitutional rights. See Estelle v. McGuire, 502 U.S.
21 62, 68–73, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine
22 state-court determinations on state-law questions. In conducting habeas review, a federal
23 court is limited to deciding whether a conviction violated the Constitution, laws, or treaties
24 of the United States."); see also Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir.
25 1991); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996) ("While a petitioner for
26 federal habeas relief may not challenge the application of state evidentiary rules, he is
27 entitled to relief if the evidentiary decision created an absence of fundamental fairness that
28 'fatally infected the trial.'"), quoting Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th
Cir. 1986).

29 ///

1 “In common with other courts, the [United States Supreme] Court has long
2 recognized that joint trials ‘conserve state funds, diminish inconvenience to witnesses and
3 public authorities, and avoid delays in bringing those accused of crime to trial.’” United
4 States v. Lane, 474 U.S. 438, 449 (1986), quoting Bruton v. United States, 391 U.S. 123,
5 134 (1968). Under California law, “[w]hen two or more defendants are jointly charged
6 with any public offense, whether felony or misdemeanor, they must be tried jointly, unless
7 the court order separate trials.” Cal. Penal Code § 1098. Under Federal law, “[i]mproper
8 joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the
9 level of a constitutional violation only if it results in prejudice so great as to deny a
10 defendant his Fifth Amendment right to a fair trial.” Lane, 474 U.S. at 446 n.8.

11 Petitioner primarily contends that the state court’s ruling ignored and did not
12 properly address his argument that the trial court’s denial of the severance motion infringed
13 his right to testify, and explains that “[t]he point of petitioner’s presentation to the trial
14 court was that Alvarado would refuse to testify if he could be impeached with the Jimenez
15 statement, and that refusal would require petitioner as well to refrain from testifying at a
16 joint trial.” (SAP at 41; see also Pet. Brief at 10.)

17 In Zafiro v. United States, 506 U.S. 534 (1993), the Supreme Court stated that when
18 co-defendants have been joined under the Federal Rules of Criminal Procedure, severance
19 should be granted “only if there is a serious risk that a joint trial would compromise a
20 specific trial right of one of the defendants, or prevent the jury from making a reliable
21 judgment about guilt or innocence.” Id., 506 U.S. at 539. In Rock v. Arkansas, 483 U.S.
22 44 (1987), the Supreme Court declared that “it cannot be doubted that a defendant in a
23 criminal case has the right to take the witness stand and to testify in his or her own defense.”
24 Id., 483 U.S. at 49.

25 Petitioner places significant reliance on Zafiro in support of his claim. (See Reply
26 at 39-42.) This reliance is misplaced, as the Ninth Circuit has explicitly held that “[b]y its
27 own wording, Zafiro only applies to federal and not state court trials. It analyzes only the
28 *Federal Rules of Criminal Procedure applicable to federal district courts.*” Collins v.

1 Runnels, 603 F.3d 1127, 1131-32 (9th Cir. 2010) (italics in original); see also Runningeagle
2 v. Ryan, 686 F.3d 758, 776-77 (9th Cir. 2012) (“In reaching that holding [in Collins v.
3 Runnels], we found that the statement in Lane regarding when misjoinder rises to the level
4 of constitutional violation was dicta and that Zafiro is not binding on the state courts
5 because it addresses the Federal Rules of Criminal Procedure. Id. at 1131-33. Neither
6 decision is ‘clearly established Federal law’ sufficient to support a habeas challenge under
7 § 2254.”)

8 Additionally, Petitioner’s assertion that the California Supreme Court ignored his
9 argument about the infringement of his right to testify is refuted by the record, as the state
10 court clearly and explicitly acknowledged this contention in adjudicating the claim on
11 direct appeal. See Hoyos, 41 Cal. 4th at 894 (“Defendant asserts that the trial court’s denial
12 of his severance motion violated his rights to due process of law, a fair trial, a reliable
13 sentence, and the right to testify on his own behalf, in violation of the Fifth, Sixth, Eighth,
14 and Fourteenth Amendments to the United States Constitution.”) The state court found
15 that the trial court’s ruling was not in error, and did not in any event result in “gross
16 unfairness” nor have a prejudicial impact on Petitioner’s guilt or penalty phase
17 proceedings. Id. at 896.

18 Indeed, in rejecting Petitioner’s Brady claim, which is discussed in greater detail in
19 Claim 13 below, the California Supreme Court also specifically rejected Petitioner’s
20 arguments about the effects of the joint defense agreement:

21 Defendant implies the above trial considerations *necessitated* his
22 adoption of the agreement with Alvarado and corresponding trial strategy. But
23 this strategy was not compelled by necessity, legal or otherwise. Even
24 assuming both codefendants wished to keep Jimenez’s statements from the
25 jury, defendant’s testifying would not necessarily have caused Alvarado to
26 testify. Alvarado’s testifying in response to Jimenez’s statements would have
27 been contingent on the nature of defendant’s testimony. If defendant’s
28 testimony painted Alvarado in a particularly bad light, Alvarado might have
testified, in order to shift the blame to defendant.

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1
2 It was also possible, however, that Alvarado would not have testified.
3 Before testifying, Alvarado would have considered the consequences of his
4 testimony: leaving defendant's testimony unrebutted, or taking the stand and
5 risk having the jury hear Jimenez's statements. Alvarado could not make that
6 calculation prior to hearing defendant's actual testimony. Neither could
7 defendant know with any certainty in advance what Alvarado would do. There
8 was no *necessary* connection between defendant's testifying and Alvarado's
9 testifying.

10 Hoyos, 41 Cal. 4th at 921.

11 As discussed below with respect to Claim 13, Petitioner's related claims of Brady
12 error and ineffective assistance of counsel, the trial court reasonably concluded that the
13 prospect of Jimenez impeaching Alvarado did not directly impact Petitioner's own decision
14 whether or not to testify, as Jimenez's testimony was not admissible against Petitioner
15 irrespective of whether Petitioner testified at trial, and any agreement between the
16 defendants was "not cognizable according to the constitution," as follows:

17 There isn't any Sixth Amendment violation that I see as to Mr. Hoyos in this
18 case. He could have testified in this case without any fear of impeachment by
19 Jiminez [sic]. He chose not to do so. In fact, he chose not to do so in advance
20 for reasons, as it seems, to be more akin to familial considerations. We sink
21 or swim together. That's not cognizable as a constitutional violation. He
22 made a decision and the potential impeaching information of the informant as
23 to his co-defendant is not really of constitutional significance as to Mr. Hoyos.
24 So in all respects, Mr. Hoyos' motion is going to be denied.

25
26 There is no showing whatsoever that the failure of testimony of Alvarado in
27 this case could have in some fashion exonerated Mr. Hoyos. Quite to the
28 contrary, as I'm understanding the positions of the lawyers, but anyway, these
two individuals decided themselves to act as a unit. That's their right. They
can decide not to testify as a unit or to testify as a unit, but that's their decision,
not cognizable according to the constitution, so that's my decision.

(RT 4729-30.)

27 The state supreme court acknowledged that Petitioner and Alvarado had a voluntary
28 strategic agreement that their prospects were best if either both defendants testified at trial,

1 or if neither testified, but Petitioner fails to offer record support for an argument that if
2 Alvarado declined to testify that Petitioner was required to decline as well. As that court
3 reasonably concluded: “There was no *necessary* connection between defendant’s testifying
4 and Alvarado’s testifying.” Hoyos, 41 Cal. 4th at 921. At most, Petitioner was faced with
5 the prospect that if he chose to testify, Alvarado would make an independent decision to
6 also testify, and the Jimenez statement would have then come in as impeachment against
7 Alvarado. The trial court, and later the state supreme court, each correctly observed that
8 Jimenez’s testimony was not admissible against Petitioner, only Alvarado, and reasonably
9 concluded that the prospect of Jimenez’s testimony did not directly impact Petitioner’s own
10 decision to testify.

11 As such, this Court is not persuaded that the trial court’s denial of the severance
12 motion violated Petitioner’s federal constitutional rights or rendered his trial fundamentally
13 unfair. See McGuire, 502 U.S. at 68-73; Jammal, 926 F.2d at 919; Ortiz-Sandoval, 81 F.3d
14 at 897. Petitioner fails to demonstrate that the California Supreme Court’s rejection of this
15 claim was contrary to, or an unreasonable application of, clearly established federal law,
16 or that it was based on an unreasonable determination of the facts. Petitioner is not entitled
17 to habeas relief on Claim 5.

18 **2. Claim 6**

19 Petitioner contends that “the trial court erred in precluding the defense from
20 presenting evidence of Mary Magoon’s drug use and violence,” including “evidence of her
21 sky-high cocaine blood content at the time of the murders; her current and prior possession
22 of firearms; and her prior incidents of violent conduct.” (SAP at 42-43.) Petitioner asserts
23 that had the jury been apprised of this information, they might have voted for a life
24 sentence. (Id. at 43.)

25 The California Supreme Court considered and rejected this claim on direct appeal,
26 reasoning as follows:

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1 Defendant contends that the court abused its discretion in excluding
2 evidence of Mary Magoon's alleged propensity for violence and use of
3 firearms. Defendant claims the exclusion violated his rights to due process, to
4 present a defense, and to a reliable penalty determination under the Fifth,
5 Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
6 As discussed below, defense counsel did not seek to admit this evidence, and,
7 even if he had, it would not have been an abuse of discretion for the trial court
8 to have excluded the evidence.

9 Before trial commenced, the court denied the prosecution's motion in
10 limine to exclude, as irrelevant, evidence of Daniel Magoon's propensity for
11 violence and prior firearm use. The court agreed with defense counsel that the
12 presence of the Ingram "Mac 10" semiautomatic pistol at the entryway of the
13 Magoon house supported the defense theory that Daniel Magoon may have
14 brandished that weapon in a confrontation with defendants, and that his
15 propensity for violence and prior use of firearms was therefore relevant. But
16 the parties did not discuss the relevance of evidence pointing to *Mary*
17 *Magoon's* propensity for violence or prior firearm use.

18 During the cross-examination of prosecution witness Jimmy Johnson,
19 defense counsel asked Johnson about statements Johnson made to the police
20 concerning Mary Magoon's propensity for violence and prior firearm use. The
21 prosecution objected to the question on relevance grounds, but the court
22 overruled the objection. Later, outside the presence of the jury, defense
23 counsel told the court that Johnson had made a prior statement to police that
24 Johnson believed Mary Magoon was heading to the bathroom to get a gun
25 before she was murdered. The court did not rule that the statement was
26 inadmissible. Instead, it observed that the evidence presented at trial thus far
27 provided no foundation for questions concerning Mary Magoon's propensity
28 for violence and firearm use. Continuing his cross-examination of Johnson,
29 defense counsel asked about a statement that Johnson had made to the police
30 that Mary Magoon "was on a runaway ... train with Dan." The court sustained
31 the prosecution's objection on relevance grounds.

32 The issue of Mary Magoon's propensity for violence resurfaced later in
33 the trial, when defense counsel asked the court to rule on defendant's pending
34 motion in limine to admit the testimony of Detective Coleman. That testimony
35 would discuss Daniel Magoon's 1982 arrest in order to show his propensity
36 for being armed during drug transactions. The court was concerned that
37 because Mary Magoon had also been present at the arrest, the testimony could
38 confuse the issues under Evidence Code section 352, particularly because

1 there was no evidence establishing Mary Magoon's propensity for violence.
2 Defense counsel made a narrower offer of proof limited to Daniel Magoon's
3 past gun use, and stated he was willing to sacrifice any testimony about Mary
4 Magoon in order to present the jury with the evidence concerning Daniel
5 Magoon. In light of the narrowed offer of proof, the court admitted Detective
6 Cole's testimony, and defendant's counsel did not object to the ruling.
7
8

9 Although the record shows that defense counsel failed to seek a ruling
10 on the admissibility of evidence concerning Mary Magoon's propensity for
11 violence and prior use of firearms, defendant contends that any further
12 attempts by trial counsel to admit such evidence would have been futile after
13 the court appeared to indicate that it believed such evidence to be
14 inadmissible. Even assuming defendant's argument to be true, the trial court
15 would not have abused its discretion in excluding such evidence under
16 Evidence Code section 352 on the ground that it would have created a
17 substantial danger of confusing the issues at trial. (See *People v. Wright*
18 (1985) 39 Cal.3d 576, 587–88, 217 Cal.Rptr. 212, 703 P.2d 1106 [court may
19 exclude under Evidence Code section 352 evidence of the aggressive and
20 violent character of the victim.]) During the pretrial discussions of the
21 relevance of admitting evidence of Daniel Magoon's propensity for violence
22 and gun use, the trial court pointed out that, in order for a murder victim's
23 propensity for violence to be relevant, there must be some evidentiary support
24 for a self-defense-type theory that the defendant perceived the murder victim
25 as presenting an immediate threat. As the trial court noted, even if the murder
26 victim were the most violent person in the world, that fact would not be
27 relevant if the evidence made it clear that the victim was taken by surprise and
28 shot in the back of the head.

29 There was no evidence indicating that Mary Magoon could have
30 presented a threat to defendant. Mary Magoon was killed in the hallway
31 bathroom, which was a significant distance away from the living room, where
32 investigators found the two rifles, or the entryway, where investigators found
33 the Ingram "Mac-10" style semiautomatic pistol. The evidence indicated that
34 she had been shot while holding three-year-old J. in her arms, beaten, and then
35 finished off with a bullet to the back of her head. Defendant's sole basis for
36 arguing that Mary Magoon might have been perceived as a threat to defendant
37 is Johnson's statement to the police that Mary Magoon might have been going
38 for a gun in the hallway bathroom, which was sheer speculation.^{FN24} Given
39 this record, it would have been within the trial court's discretion to have
40 excluded the admission of evidence pertaining to Mary Magoon's alleged
41 propensity for violence and prior use of firearms.
42
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1 FN24. Defendant asserts that Mary Magoon “was found
2 on the floor near the empty box of a weapon just like the one she
3 was known to have carried in the past.” But defendant is
4 mistaken. The empty gun box of the Helwan pistol was found in
5 a hidden compartment in the *master bedroom bathroom*, not in
the *hallway bathroom* where investigators found Mary Magoon’s
body.

6 Hoyos, 41 Cal. 4th at 911-13 (bracket in original). The state supreme court also rejected
7 Petitioner’s contention that the trial court’s ruling resulted in prejudice with respect to his
8 penalty phase proceedings. See id. at 927 fn. 38 (“Because we discern no error in any area
9 of the guilt phase, we reject defendant’s claims of any prejudicial effect in the penalty phase
10 arising from these or any other guilt phase rulings.”)

11 “[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to
12 present a complete defense.’” Crane v. Kentucky, 476 U.S. 683, 690 (1986), quoting
13 California v. Trombetta, 467 U.S. 479, 485 (1984). Even so, “[t]he accused does not have
14 an unfettered right to offer testimony that is incompetent, privileged, or otherwise
15 inadmissible under standard rules of evidence.” Taylor v. Illinois, 484 U.S. 400, 410
16 (1988). “While the Constitution thus prohibits the exclusion of defense evidence under
17 rules that serve no legitimate purpose or that are disproportionate to the ends that they are
18 asserted to promote, well-established rules of evidence permit trial judges to exclude
19 evidence if its probative value is outweighed by certain other factors such as unfair
20 prejudice, confusion of the issues, or potential to mislead the jury.” Holmes v. South
21 Carolina, 547 U.S. 319, 326 (2006); see also Menendez v. Terhune, 422 F.3d 1012, 1033
22 (9th Cir. 2005) (“[A] trial judge may exclude or limit evidence to prevent excessive
23 consumption of time, undue prejudice, confusion of the issues, or misleading the jury. The
24 trial judge enjoys broad latitude in this regard, so long as the rulings are not arbitrary or
25 disproportionate.”) (citations omitted).

26 The state record reflects that the trial court repeatedly expressed concerns about the
27 possibility that the defense would seek to introduce evidence concerning Mary Magoon’s
28 propensity for violence, and opined that such evidence did not appear relevant based on the

1 circumstances of the crime, as reflected in the crime scene photos. During a break in the
2 trial proceedings, the trial court generally noted that “[t]here was a portion of the testimony
3 this morning that I think ran afoul of some of our previous discussions concerning the scope
4 of permissible examination concerning the aggressiveness of the victims in this case, the
5 propensity towards violence, if any, of any victims in this case.” (RT 3323.) The trial
6 court stated that: “The focus has always been on Daniel Magoon, Daniel Magoon being,
7 from the defense perspective, a violent individual, the crime scene supporting certain
8 inferences which may lend support to the absence of premeditation.” (RT 3324.) The trial
9 court specifically referenced Jimmy Johnson’s testimony, noted that the parties’ earlier
10 focus had been on propensity evidence as it related to Daniel Magoon, and stated that: “We
11 didn’t talk about Mary Magoon. Now, from the crime scene photographs that I have seen,
12 I have a great deal of difficulty determining or finding any relevance to testimony
13 concerning Ms. Magoon’s use of weapons, her propensity, if there is such, towards
14 violence. I haven’t seen anything that would cause me to think that’s relevant.” (RT 3324-
15 25.)

16 The trial court expressed concern about whether the defense’s questions would go
17 towards Mary Magoon, given that crime scene photos showed she was shot in the back of
18 the head. (RT 3325.) In response, defense counsel indicated that Johnson previously
19 indicated that Mary Magoon had prior weapon use, had previously possessed a gun, knew
20 how to use guns, and that Johnson speculated that she might have been going for a weapon.
21 (RT 3325-26.) The trial court responded that: “I am not saying there was any impropriety
22 in any question, but I think your position so far as she might have been going into the
23 bathroom for a gun is, from what I see, is an argument that you can make, of course, but I
24 don’t see evidentiary support of that from the crime scene or from the testimony as to
25 location of weapons, that sort of thing. And I think the inquiry into that area should be
26 carefully approached.” (RT 3326-27.) The trial court then stated: “I wanted to explain to
27 you my thinking from the evidence that I have seen of the crime scene, the discussions,
28 and my thinking on it so that you can proceed accordingly. I’m not telling you how to ask

1 questions or what questions to ask. But I'm aware of the issue now." (RT 3328.)

2 A short time later, during testimony in front of the jury, Johnson stated that he knew
3 Daniel Magoon had a hidden compartment in the home for narcotics or drugs. (RT 3333.)
4 Defense counsel broached the subject of Mary Magoon, and asked Johnson about a
5 statement Johnson made to police that "She was on a runaway, runaway train with Dan,"
6 to which the trial court sustained the prosecutor's relevance objection. (RT 3333-34.)
7 Counsel refrained from asking additional questions about Mary Magoon and returned to
8 the subject of Daniel Magoon; Johnson acknowledged that he told police Daniel Magoon
9 would have a gun out when people came to his home at night. (RT 3334.)

10 Later in the trial proceedings, the defense attempted to introduce testimony about
11 Daniel Magoon's prior arrest, at which Mary Magoon was present, to show that he carried
12 a gun during drug deals. The trial court repeated his reservations as far as they involved
13 Mary Magoon, stating: "The second aspect of my concerns under [Cal. Penal Code section]
14 352 are the potential for the confusion of issues. When we bring forth that incident in 1984
15 or '85, we have Miss Fisher¹¹ part and parcel of that incident. And to the extent that she
16 is, in effect, the subject of the same broad brush as Mr. Magoon, there is no true question
17 that I see as to her propensity for violence. As I have said before, we can speculate that
18 she might have been in that bathroom looking for a gun, but I think it's pure speculation.
19 Everything seems to point to something other than that. So there is the question of the
20 undue consumption of time." (RT 3501.) The defense stated they were "more than willing
21 to narrow it, leave her out," and only introduce the evidence as it pertained to Daniel
22 Magoon. (RT 3504, 3508.) The trial court allowed the testimony as limited by the defense.
23 (RT 3790.)

24 Even if this Court were to assume, without deciding, that the trial court's articulated
25 reservations with the introduction of evidence concerning Mary Magoon's propensity for
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28 ¹¹ Fisher was Mary Magoon's maiden name, as she was not yet married to Daniel
Magoon at the time of this incident. (RT 3502.)

1 violence amounted to an express ruling excluding that evidence, Petitioner fails to show
2 that the trial court's decision constituted an abuse of discretion or was "arbitrary or
3 disproportionate." Menendez, 422 F.3d at 1033. Again, "it is not the province of a federal
4 habeas court to reexamine state-court determinations on state-law questions." McGuire,
5 502 U.S. at 68. Petitioner fails to show that the failure to admit this evidence rendered his
6 trial "fundamentally unfair." Jammal, 926 F.2d at 919.

7 As the state court reasonably concluded, there was no actual evidence that Mary
8 Magoon presented a threat to the defendants, and thus, the trial court correctly concluded
9 that evidence of her propensity for violence or weapon use was not relevant. Petitioner
10 argues that the state supreme court's decision failed to specifically mention the cocaine
11 found in Mary Magoon's system, which "was admissible to show her likely aggressive and
12 volatile conduct," and "would have provided the type of foundation for the rest of the
13 evidence regarding her use of firearms then and in the past, and of her immersion in the
14 violent drug-dealing business with her husband." (SAP at 47.) However, there is no
15 evidence in the record that Mary Magoon was aggressive or violent under the influence of
16 cocaine.¹² Dr. Stephen Stahl, who testified at trial about the cocaine levels in Daniel
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19 ¹² In support of the first state habeas petition, Petitioner submitted the declaration of
20 Cherlyne Short Majors, the director of a health services management company with over
21 30 years experience in the fields of "child/maternal health and substance dependence," who
22 opines that the "cocaine and residue found in Mrs. Magoon's blood is a very substantial
23 dose." (Lodgment No. 111, Ex. 62.) Majors opines that the condition of the Magoon home
24 and the Magoons' youngest son "suggests that Mrs. Magoon had used cocaine [or related
25 stimulants] for a lengthy period, and had likely developed a high tolerance." (Id.) (bracket
26 in original.) Majors states that Mary Magoon was "neurologically impaired" at the time of
27 her death and "[i]t is highly probable that her movements in that moment of crisis did not
28 comport to her own norms, much less the norms of the larger society." (Id.) However, as
the instant claim was only raised on direct appeal, Majors' declaration cannot be considered
in support of this claim, as it was not presented to the California Supreme Court until the
state habeas petition. See Pinholster, 563 U.S. at 181 ("[R]eview under § 2254(d)(1) is
limited to the record that was before the state court that adjudicated the claim on the
merits.") Even were the Court able to consider this declaration, it does not support

1 Magoon's system, stated that cocaine use results in feelings of euphoria and pleasure, and
2 that higher doses could cause a person to act suspicious, paranoid, hostile, or even
3 delusional. (RT 3756.) However, Dr. Stahl also stated that the effects of cocaine use was
4 impacted by several factors, including a person's age, weight, prior use, and that the drug
5 affected people differently; he could not state what impact it would have on a particular
6 person, such as Daniel Magoon. (RT 3757-58.) As such, the record evidence fails to
7 support a conclusion that Mary Magoon's cocaine use, on its own, would have provided a
8 foundation for the introduction of the desired propensity evidence.

9 More importantly, in ruling that evidence of Daniel Magoon's weapon possession
10 and propensity for violence was admissible, the trial court heard evidence not only of the
11 cocaine found in the victims' system, but that Daniel Magoon had a long-standing
12 involvement in drug dealing involving large amounts of marijuana and money, sold and
13 possessed numerous weapons, and that a large automatic weapon was found at the doorway
14 of the house, and that he dealt drugs out of his garage and kept weapons there. (RT 2805-
15 06, 2814, 2822-23.) With that showing, the trial court articulated that the defense was
16 entitled to argue that the evidence would show Daniel Magoon was a "very violent
17 individual, armed himself with weapons, was very familiar with weapons, had an automatic
18 weapon in the garage at one point." (RT 2834-35.)

19 Petitioner fails to offer any similar evidence with respect to Mary Magoon. That she
20 was in the company of Daniel Magoon when he was arrested more than ten years earlier,
21 and had at one prior point possessed and used a gun fails to demonstrate a propensity for
22 violence. Jimmy Johnson's statement that Mary Magoon might have been going for a gun
23 that evening is pure speculation, and markedly abstract in comparison to Mr. Johnson's
24 statements to the police that Daniel Magoon collected and sold drugs and weapons and that
25 he knew Daniel Magoon to answer the door at night with a gun at his side. (See RT 3334.)

27 Petitioner's contention, as Majors does not indicate that Mary Magoon was likely either
28 aggressive or violent.

1 In the merits brief, Petitioner also faults the state supreme court for “mak[ing] no
2 mention of the fact that an M1 rifle was found in the bathroom where she was eventually
3 shot, strongly indicating it was a highly reasonable inference, not ‘sheer speculation’ she
4 was going for a weapon at the time she was shot.” (Pet. Brief at 13.) A review of the state
5 record refutes this contention, as it clearly reflects that the M-1 rifle was located in the
6 master bedroom bathroom, not the hallway bathroom where Mary Magoon was found.
7 (See RT 3040-43) (testimony that M-1 rifle, pills, ammunition, and box to pistol were
8 found in storage area hidden behind a cabinet in master bedroom bathroom). Indeed, the
9 California Supreme Court earlier refuted the similar mistaken argument concerning Mary
10 Magoon’s location, observing that: “Defendant asserts that Mary Magoon ‘was found on
11 the floor near the empty box of a weapon just like the one she was known to have carried
12 in the past.’ But defendant is mistaken. The empty gun box of the Helwan pistol was found
13 in a hidden compartment in the *master bedroom bathroom*, not in the *hallway bathroom*
14 where investigators found Mary Magoon’s body.” Hoyos, 41 Cal. 4th at 913 n. 24. In the
15 reply brief, Petitioner retracts the earlier assertion about the M-1 rifle and acknowledges
16 that no weapons were found in the hallway bathroom where Mary Magoon was shot, but
17 nonetheless argues that “the record does indicate that the Magoons had weapons stashed
18 all over the house, and she may have been going to get them when she was shot from
19 behind.” (Reply at 49 n. 3.) This contention, like Johnson’s statement, is pure conjecture.

20 Meanwhile, as the trial court reasonably determined, the crime scene evidence fails
21 to support a conclusion that Mary Magoon presented any threat to the defendants. Again,
22 Mary Magoon was found in the hallway bathroom in her pajamas, and had suffered
23 multiple blunt force trauma to the face, body and head as well as a gunshot to the back of
24 the head. There were no weapons within reach, as the weapons found in a bathroom were
25 in a hidden compartment in the master bathroom, several rooms away, not the bathroom
26 where Mary was found. The other guns noted were a rifle and an air rifle in the living
27 room and a pistol in the entryway to the home, each also a significant distance from Mary
28 Magoon’s location. Contrary to showing that Mary ever used the air rifle, the evidence

1 instead reflected that the weapon was used against her, as blood on the barrel was consistent
2 with her blood type and injuries to her head and back could have been caused by the rifle.
3 Finally, any possibility that Mary sought to use the weapons found near the front of the
4 home would have been further complicated by their location, given the defense theory that
5 Daniel Magoon likely answered the door with a weapon brandished.

6 More significantly, there was ample evidence that the violence inflicted on Mary
7 Magoon was likely done in close proximity to her youngest son. Hair found in Mary
8 Magoon's left hand was consistent with that of her three-year-old son J. (RT 3354-59.)
9 Her son's pacifier was found clutched in Mary's hand and a baby blanket was lying
10 between her legs. (RT 2890-93, 3033.) Dr. Arthur Koehler, a pathologist who reviewed
11 the records concerning the wounds suffered by both Mary Magoon and her son, testified
12 that the wound to J. was tangential rather than direct, “[a]nd in reviewing the wound of the
13 decedent, Mary Magoon, it's very likely that this missile passed through the arm without
14 slowing down and was very capable of causing a tangential wound” in her son J. (RT 3765,
15 3768.) Dr. Irving Root, another pathologist who reviewed the autopsy reports and
16 photographs, stated that assuming a bullet struck Mary and then hit her son J., it was likely
17 the “graze wound on the base of thumb” rather than the wound to the forearm. (RT 3807.)

18 In sum, the evidence in the record simply fails to support a defense theory that Mary
19 Magoon presented a threat to the defendants, much less the imminent threat necessary to
20 justify the introduction of propensity type evidence. As a result, the Court cannot conclude
21 that the trial court's decision was in error, much less that it rendered Petitioner's trial
22 “fundamentally unfair.” Jammal, 926 F.2d at 919.

23 Finally, even were Petitioner able to demonstrate that the trial court's ruling
24 amounted to error of a constitutional dimension, he fails to demonstrate prejudice at either
25 phase of trial. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (trial error warrants
26 habeas relief only if it “had substantial and injurious effect or influence in determining the
27 jury's verdict.”) Petitioner fails to demonstrate any possible guilt phase prejudice, as the
28 jury was presented with concrete evidence about Daniel Magoon's propensity for violence,

1 including his lengthy involvement in drug and gun trafficking, prior arrest, the cocaine in
2 his system and the potential effects, and that he was often armed when answering the door
3 at night. Nonetheless, the jury rejected the defense's self-defense and manslaughter
4 arguments and found Petitioner guilty of first-degree murder in the death of Daniel
5 Magoon. Given that verdict and the comparatively thin evidence concerning Mary
6 Magoon's propensity for violence, there is no reasonable likelihood that the jury would
7 have been persuaded that a lesser degree of murder was appropriate in her case.

8 With respect to the penalty phase, even had the trial court allowed counsel to present
9 similar evidence about Mary Magoon, such as her prior weapon possession and the
10 speculation that she might have been going for a gun, the Court remains similarly
11 unpersuaded that this evidence would have resulted in a verdict of life in prison rather than
12 the death penalty for her murder. Again, Mary Magoon was found rooms away from a
13 weapon, and while there is evidence indicating she was beaten with the air rifle, there is no
14 indication that she wielded a weapon at any point during the murders. Instead, she was
15 murdered in her pajamas, with a pacifier in her hand and a baby blanket at her feet, near
16 enough to her three year old son that the bullet that struck his head was possibly aimed at,
17 and first hit, her hand or arm. Based on a review of the record, Court finds no possibility
18 that the omission of the evidence at issue "had substantial and injurious effect or influence
19 in determining the jury's verdict" at the penalty phase. Brecht, 507 U.S. at 637.

20 After reviewing the record, it is clear that the California Supreme Court's rejection
21 of Claim 6 was not contrary to, or an unreasonable application of, clearly established
22 federal law, nor has Petitioner shown that it was based on an unreasonable determination
23 of the facts. In addition, any error is clearly harmless. Petitioner does not merit relief on
24 Claim 6.

25 **3. Claim 7**

26 Petitioner contends that the trial court erred in refusing to instruct the jury on
27 voluntary manslaughter with respect to the death of Mary Magoon, or allow the
28 presentation of evidence supporting that theory, and asserts that these actions "prevented

1 petitioner from having his theory of the case considered by the jury with respect to
2 reasonable doubt as to the first-degree murder charge.” (SAP at 48.)

3 The California Supreme Court considered and rejected this claim on direct appeal,
4 reasoning as follows:

5 Defendant contends the trial court erred in refusing to instruct the jury
6 on the voluntary manslaughter of Mary Magoon as a lesser included offense
7 of murder, on the theory that her killing was committed either in sudden
8 quarrel/heat of passion or in unreasonable self-defense. Defendant claims the
9 court’s failure to so instruct deprived him of his due process right to have the
10 jury determine every material issue the evidence presented. Defendant again
11 points to Mary Magoon’s alleged propensity for violence and claims that her
12 alleged role in the family business may have led defendant to believe she was
13 “going for a weapon in the bathroom when killed.” Defendant asserts that this
14 evidence “supports a voluntary manslaughter instruction because it was
15 sufficient to deserve consideration by the jury, and a reasonable jury could
16 find it sufficiently persuasive to warrant a verdict of voluntary manslaughter.”

17 We disagree. ““Manslaughter is “the unlawful killing of a human being
18 without malice.”” [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 102,
19 24 Cal.Rptr.3d 507, 105 P.3d 1099, quoting § 192.) Even though a court must
20 instruct on general principles of law relevant to the issues the evidence raises,
21 “[a] court is not obligated to instruct *sua sponte* on voluntary manslaughter as
22 a lesser included offense in the absence of substantial evidence that the
23 defendant acted in a ‘sudden quarrel or heat of passion’ (§ 192, subd. (a)), or
24 that the defendant killed in ““unreasonable self-defense.””” [Citation.]”
25 (*Benavides*, at p. 102, 24 Cal.Rptr.3d 507, 105 P.3d 1099.) There was no
26 evidence that the killing of Mary Magoon involved sudden quarrel/heat of
27 passion or unreasonable self-defense, and therefore no support for a voluntary
28 manslaughter instruction.

29 Hoyos, 41 Cal. 4th at 913-14.

30 “It is well-settled that a criminal defendant is entitled to a jury instruction ‘on any
31 defense which provides a legal defense to the charge against him and which has some
32 foundation in the evidence, even though the evidence may be weak, insufficient,
33 inconsistent, or of doubtful credibility.’” United States v. Sotelo-Murilo, 887 F.2d 176,
34 178 (9th Cir. 1989), quoting United States v. Yarbrough, 852 F.2d 1522, 1541 (9th Cir.
35 1988); see also Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 1999), citing United States v.

1 Mason, 902 F.3d 1434, 1438 (9th Cir. 1990). In Beck v. Alabama, 447 U.S. 625 (1980),
2 the Supreme Court held that failing to instruct a capital jury on a lesser-included charge
3 supported by the evidence violates the Constitution, stating that “when the evidence
4 unquestionably establishes that the defendant is guilty of a serious, violent offense- but
5 leaves some doubt with respect to an element that would justify conviction of a capital
6 offense- the failure to give the jury the ‘third option’ of convicting on a lesser included
7 offense would seem inevitably to enhance the risk of an unwarranted conviction.” Id. at
8 637.

9 At trial, defense counsel requested instructions on both second-degree murder and
10 manslaughter with respect to Mary Magoon, arguing that “the entire sequence of events
11 took place within a relatively short period of time, so that the violence suffered by Mary
12 Magoon was in close proximity to the violence suffered by Daniel Magoon by most
13 arguable theories of the case. And that were he to be killed in the heat of passion, it’s not
14 completely impossible or implausible that that heat of passion continued over to her as a
15 co-partner and ultimately co-victim.” (RT 3922.) Counsel specifically cited James
16 Johnson’s statement that Mary Magoon had previously used a Beretta-type gun, which was
17 similar to the Helwan connected to the crimes. (RT 3923.) The trial court rejected the
18 request, stating that “whether she had a gun in the past or didn’t have a gun in the past is
19 absolutely irrelevant to her credit,” and concluding that “there is just no evidence that
20 would support a voluntary manslaughter instruction or conviction.” (RT 3924.)

21 Petitioner argues that there was actually “ample” evidence to support a manslaughter
22 instruction, considering her involvement in her husband’s drug-dealing activities, the
23 weapons in their home, and the cocaine in her system. (See Pet. Brief at 15¹³, Reply at 50-
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26 ¹³ In the merits brief, Petitioner also supports his contention that there was “ample”
27 evidence of a potential threat from Mary Magoon by erroneously arguing, as was done in
28 support of Claim 6, that Mary “was shot in the immediate proximity of a M1 rifle concealed
in the bathroom where she was found.” (Pet. Brief at 15.) Again, the record reflects that

1 52.) As discussed above in Claim 6, however, the presence of cocaine in her system does
2 not support the defense theory, given that there is no indication she acted violent or
3 aggressive when under the influence. Nor does Petitioner offer any actual evidence of her
4 direct involvement in her husband's drug dealing activities - the fact that she lived in the
5 home and was likely aware of the drugs and weapons does not establish that she was a
6 participant, as the trial testimony on the matter only went to Daniel Magoon's involvement.

7 Finally, the crime scene evidence offers no support for, and actually undermines, a
8 manslaughter theory. Under California law, “[a] court is not obligated to instruct sua
9 sponte on voluntary manslaughter as a lesser included offense in the absence of substantial
10 evidence that the defendant acted in a ‘sudden quarrel or heat of passion’, or that the
11 defendant killed in ‘unreasonable self-defense,’” People v. Benavides, 35 Cal. 4th 69, 102
12 (2005) (internal and external citations omitted). As discussed in greater detail above, Mary
13 Magoon died in her pajamas in the hallway bathroom of her home, several rooms away
14 from any weapons, having been beaten numerous times on the skull and body and shot in
15 the back of the head. There is also no indication that Mary Magoon used or wielded any
16 weapon that evening, even as Petitioner points to her prior possession of a gun years before
17 the murder and Johnson's speculation that she could have been going for a gun. Yet,
18 instead of any such evidence, Mary was found holding her three-year-old son's pacifier in
19 her hand, with strands of hair similar to her son's also found clutched in her hand, and a
20 baby blanket between her legs. The evidence also reflected that her son may have been
21 near her when he was shot, as the bullet which hit him was consistent with having passed
22 through her hand or arm before striking his head. Petitioner fails to demonstrate that this
23 theory of the crime had any support, much less “some foundation in the evidence” so as to
24 warrant instruction. See Sotelo-Murilo, 887 F.2d at 178. Considering this record, it is
25 clear that the California Supreme Court was not unreasonable in concluding that: “There

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28 the M-1 rifle was located in the master bedroom bathroom, not the hallway bathroom where
Mary Magoon was found, and does not support Petitioner's argument. (See RT 3040-43.)

1 was no evidence that the killing of Mary Magoon involved sudden quarrel/heat of passion
2 or unreasonable self-defense, and therefore no support for a voluntary manslaughter
3 instruction.” Hoyos, 41 Cal. 4th at 914.

4 Nor has Petitioner demonstrated that the trial court’s ruling violated Beck, as
5 Petitioner’s jury was instructed to consider the lesser-included offense of second-degree
6 murder in the death of Mary Magoon. (RT 4258, 4283-88.) In this case, unlike in Beck,
7 the jury was provided with the options of first-degree murder and acquittal, as well as a
8 “third option” of convicting Petitioner of the non-capital charge of second-degree murder.
9 Id., 447 U.S. at 637. Petitioner fails to demonstrate that this procedure runs afoul of Beck
10 or constitutes a due process violation. Indeed, the Ninth Circuit has plainly stated that “jury
11 instructions are not required as to all possible lesser-included offenses.” Beardslee v.
12 Woodford, 358 F.3d 560, 576 (9th Cir. 2003) (trial court did not err in declining to instruct
13 on manslaughter where jury could consider both second-degree murder or first degree-
14 murder without special circumstances as lesser included offenses to capital murder, as “the
15 jury had more than the simple all-or-nothing choice at issue in Beck.”), citing Murtishaw
16 v. Woodford, 255 F.3d 926, 955 (9th Cir. 2001) (trial court’s failure to instruct on imperfect
17 self-defense, where jury was instructed on both second-degree murder and manslaughter,
18 did not force the jury into an “all or nothing” choice in violation of Beck).

19 Not only does Petitioner fail to show that the evidence warranted a manslaughter
20 instruction, he also fails to demonstrate that such an instruction was dictated by Beck, given
21 that the jury was given the lesser-included option of second-degree murder. The claim is
22 without merit. Accordingly, the Court cannot conclude that the California Supreme
23 Court’s rejection of this claim was contrary to, or an unreasonable application of, clearly
24 established federal law, or that it was based on an unreasonable determination of the facts.
25 Habeas relief is not warranted on Claim 7.

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1 4. **Claim 8**

2 Petitioner contends that the prosecutor repeatedly referenced torture with respect to
3 the death of Mary Magoon, despite the fact that the jury was not instructed on torture nor
4 was required to find that it had occurred, and that Petitioner “was substantially prejudiced
5 by the prosecutor’s emphasis with the trial court’s consent that the case involved torture,”
6 violating his rights under the Fifth, Sixth, and Fourteenth Amendments. (SAP at 50-51.)

7 On direct appeal, the California Supreme Court rejected this claim with the
8 following reasoned opinion:

9 Defendant contends the court violated his rights to due process, a fair
10 trial, and a reliable sentence under the Fifth, Sixth, Eighth, and Fourteenth
11 Amendments to the United States Constitution because the prosecution
12 misused the law related to conspiracy, and effectively charged defendant with
13 murder by torture, when it listed the torture of Mary Magoon as one of 10
14 overt acts in the conspiracy to commit robbery count (a noncapital offense for
15 which defendant and Alvarado were charged and found guilty). Defendant
16 further contends that the prosecutor’s references to torture during the trial had
17 the effect of trying defendant for murder by torture, even though neither
18 codefendant was so charged, and the trial court did not instruct the jury in any
19 definition of torture. Defendant does not specify whether the asserted error is
20 based on prosecutorial misconduct in using the word “torture” or the trial
21 court’s failure to instruct the jury in the legal elements of torture, but we
22 discern no error under either theory. Defense counsel never objected to the
23 prosecution’s use of the word “torture” in the information or at trial. For this
24 reason, we consider any claim based on the prosecution’s use of the word
25 “torture” forfeited. (*Jenkins, supra*, 22 Cal.4th at p. 1000, 95 Cal.Rptr.2d 377,
26 997 P.2d 1044.) In addition, as we explain, even if defendant did not forfeit
27 the issue, he fails to show prejudice.

28 1. *Torture as an Overt Act*

29 Count 1 of the information charged both codefendants with conspiracy
30 to commit robbery. It listed 10 overt acts: (1) arming themselves with nine-
31 millimeter pistols; (2, 3) driving to Daniel Magoon’s residence and entering
32 it; (4) shooting and murdering Daniel Magoon; (5) torturing Mary Magoon;
33 (6) shooting and murdering Mary Magoon; (7) shooting and wounding J.; (8-
34 10) stealing Daniel Magoon’s marijuana, nine-millimeter Helwan pistol, and
35 money. The information charged murder generally, and did not specify first

1 degree murder by torture under section 189. Defendants were not charged with
2 the crime of torture under section 206, nor was torture alleged as a special
3 circumstance under section 190.2, subdivision (a)(18). The prosecution
4 submitted but, on defense counsel's objection, withdrew a first degree murder
5 by torture instruction. The court did not instruct the jury on any torture
6 definition.

7 For the conspiracy count, defendant cites no authority holding the trial
8 court was required to instruct the jury on the meaning of the word "torture,"
9 as an overt act. "A court has no *sua sponte* duty to define terms that are
10 commonly understood by those familiar with the English language, but it does
11 have a duty to define terms that have a technical meaning peculiar to the law."
12 (*People v. Bland* (2002) 28 Cal.4th 313, 334, 121 Cal.Rptr.2d 546, 48 P.3d
13 1107.) In the information, the word "torture" was used in its commonly
14 understood sense to describe an overt act, not as part of a legal definition of
15 conspiracy. Overt acts are not required to be crimes. (*People v. Marquez*
16 (1994) 28 Cal.App.4th 1315, 1325–26, 33 Cal.Rptr.2d 821.) Because there is
17 no indication the word "torture" was being used in a technical legal sense, the
18 trial court had no *sua sponte* duty to define the term in the conspiracy count.

19 Even assuming the trial court erred in not instructing on the meaning of
20 the word "torture" as an overt act, any error was harmless under any standard.
21 (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705
22 [federal constitutional error assessed under harmless beyond a reasonable
23 doubt standard]; *People v. Watson* (1956) 46 Cal.2d 818, 836–837, 299 P.2d
24 243 [state law error assessed under reasonable probability standard]; *People*
25 *v. Flood* (1998) 18 Cal.4th 470, 490, 502–504, 76 Cal.Rptr.2d 180, 957 P.2d
26 869 [instructional error subject to harmless error review].) Substantial
27 evidence supported the other nine overt acts, any one of which also supported
28 the jury's guilty verdict on the conspiracy count. (*People v. Russo* (2001) 25
Cal.4th 1124, 1128, 108 Cal.Rptr.2d 436, 25 P.3d 641 [jury need not
unanimously agree on the same overt act to convict for conspiracy].)

23 2. *First Degree Murder by Torture*

24 Defendant contends the court should have instructed the jury on the
25 legal elements of torture. But because defendant was not charged with the
26 separate crime of torture under section 206, or torture as a special
27 circumstance under section 190.2, subdivision (a)(18), the trial court had no
28 duty to instruct on either. Murder by torture is a specified statutory basis for
first degree murder. (§ 189.) The information charging defendant with murder

1 did not specify first degree murder by torture, but the accusatory pleading
2 need not specify the theory of first degree murder on which the prosecution
3 intends to rely. (See *People v. Diaz* (1992) 3 Cal.4th 495, 556–57, 11
4 Cal.Rptr.2d 353, 834 P.2d 1171 [information need not specify first degree
5 murder by poison].) Of course, even though the prosecutor did not charge first
6 degree murder by torture, he still might have presented the elements of murder
7 by torture to the jury in the course of presenting his case. But even assuming
8 the prosecutor, in effect, developed a murder by torture theory at trial and even
9 assuming the trial court had a duty to instruct on first degree murder by torture,
10 defendant can show no possible prejudice from the absence of the instruction.
11 The jury was instructed on two theories supporting a guilty verdict for first
12 degree murder: premeditation and felony murder. The jury found defendant
13 guilty of first degree murder as to Mary Magoon based on either or both of
14 those theories. There was no possible prejudice to defendant by the trial
15 court's failure to provide the jury with a *third* theory for returning a verdict of
16 first degree murder. Whether the jury accepted or rejected this third theory
17 would not have changed the verdict of first degree murder it returned based
18 on the other two theories.

19 Hoyos, 41 Cal. 4th at 914-16. The state supreme court also rejected Petitioner's contention
20 that the trial court's ruling resulted in prejudice with respect to his penalty phase
21 proceedings. See id. at 927 fn. 38 ("Because we discern no error in any area of the guilt
22 phase, we reject defendant's claims of any prejudicial effect in the penalty phase arising
23 from these or any other guilt phase rulings.")

24 Habeas relief may be warranted on a claim of state instructional error if the error in
25 question "so infected the entire trial that the resulting conviction violates due process."
26 McGuire, 502 U.S. at 72, quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973). "[I]t is
27 well established that the instruction 'may not be judged in artificial isolation,' but must be
28 considered in the context of the instructions as a whole and the trial record." McGuire, 502
U.S. at 72, quoting Cupp, 414 U.S. at 147. Even if constitutional error is found to have
occurred, relief remains unavailable unless that error had a "substantial and injurious effect
or influence in determining the jury's verdict." Brecht, 507 U.S. at 637.

29 Petitioner asserts that trial court's failure to define torture violated his constitutional
30 rights because the jury could have used an "ad hoc" definition to find the overt act true at

1 the guilt phase, and could have relied on that same definition as a basis for their penalty
2 phase verdict. In the merits brief, Petitioner clarifies that he is not advocating that torture
3 should have been offered as a third theory of first degree murder, but that the absence of
4 an instruction defining torture precluded the jury from concluding torture was not
5 applicable to his case. (Pet. Brief at 16-17.) In the Reply, Petitioner outlines differences
6 between the dictionary definition of torture and the definition of torture under section 206
7 of the California Penal Code, and asserts that because torture was alleged as an overt act,
8 and one overt act must be found true in order to convict Petitioner of the conspiracy charge,
9 torture should have been defined for the jury. (Reply at 54.)

10 Petitioner fails to cite to any clearly established authority supporting his claim of
11 constitutional error. He generally cites to and quotes from Lanzetta v. New Jersey, 306
12 U.S. 451, 453 (1939), to argue that “[n]o one may be required at peril of life, liberty or
13 property to speculate as to the meaning of penal statutes.” (Reply at 53.) Yet, again, that
14 is not the situation presented here. Petitioner was not charged with torture as either a
15 special circumstance or as a theory of murder, as torture was instead alleged as one of ten
16 overt acts comprising the conspiracy charge, along with other overt acts comprised of
17 similarly common terms, including that the defendants “armed themselves with 9mm
18 semiautomatic pistols,” that they “drove over to” and “entered” the victims’ residence, that
19 they “shot and murdered” each of the two adult victims, that they “shot and wounded” the
20 child victim, and that they “stole” Daniel Magoon’s Helwan, marijuana, and money. (CT
21 28.)

22 The California Supreme Court concluded that the trial court did not err in failing to
23 define torture, given that torture was not charged as a theory of murder, but instead “was
24 used in its commonly understood sense to describe an overt act, not as part of a legal
25 definition of conspiracy.” Hoyos, 41 Cal. 4th at 915. Ninth Circuit authority is in accord
26 with the state court’s conclusion. “Whether a term in a jury instruction requires definition
27 normally turns on whether it expresses a concept within the jury’s ordinary experience.”
28 United States v. Tirouda, 394 F.3d 683, 688 (9th Cir. 2005). In Tirouda, the Ninth Circuit

1 rejected an allegation of error arising from the trial court's failure to define term
2 "accomplice." Id. at 689; see also United States v. Lloyd, 807 F.3d 1128, 1165 (9th Cir.
3 2015) (rejecting claim of trial court error in failing to define "reckless disregard," reasoning
4 that "[r]ecklessness in this context is 'within the comprehension of the average juror' and
5 needs no special definition."), quoting Tirouda, 394 F.3d at 688-89. Here, torture was
6 alleged as one of ten overt acts, and the use of the term in the overt act "torturing Mary,"
7 did not require a definition, because, similar to the terms used in the other overt acts such
8 as "stole" or "drove over to," it was capable of being understood without additional
9 definition and "express[ed] a concept within the jury's ordinary experience." Id. at 689.
10 Moreover, reviewing Petitioner's contention in light of the instructions as a whole, as
11 required, there is no support for a conclusion that the trial court's failure to specifically
12 define torture for the jury "so infected the entire trial that the resulting conviction violates
13 due process." McGuire, 502 U.S. at 72, quoting Cupp, 414 U.S. at 147.

14 In any event, even were Petitioner able to demonstrate error, he fails to show
15 prejudice. First, there is no support for Petitioner's speculative argument that the jury
16 formulated their own erroneous definition of torture and relied on that definition in arriving
17 at the guilt and penalty phase verdicts. Petitioner argues that "[t]he question is not whether
18 Count One conspiracy was adequately proved, but rather whether the jury likely found the
19 perpetrator had tortured Mary under a broad definition that exceeded the scope of the
20 criminal law definition, and relied on that 'circumstance of the offense,' Penal Code section
21 190.3(a), as the basis to return a death verdict as to the Mary Magoon murder." (Reply at
22 56.) There is nothing in the record to support a conclusion that the jury was confused or
23 that, if confusion arose, the jurors created their own definition of torture rather than inquire
24 with the trial court as to the definition. Indeed, just prior to guilt phase deliberations, the
25 trial court instructed the jurors that "if in going through these instructions in deliberations
26 you have any questions about how one instruction perhaps relates to another instruction or
27 anything at all, don't be at all reluctant to write out your question. Give it to the bailiff.
28 He'll give it to the court. I'll make the lawyers see it as well. Then we'll do what we can

1 to answer the question. Any deliberating juror has the right to ask any questions.” (RT
2 4259.) A jury is presumed to understand and follow the trial court’s instructions. Weeks
3 v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200, 211 (1989).

4 Petitioner nonetheless asserts that the failure to define torture “likely explains the
5 jury’s death verdict as to Mary Magoon but not as to Dan Magoon.” (Reply at 53; see also
6 Pet. Brief at 17.) This contention is purely speculative and is belied by the record. As
7 discussed above in Claim 6, the evidence also showed that while Mary was killed in close
8 proximity to her child, in her nightclothes, several rooms away from any weapon, there
9 was evidence that Daniel Magoon had a long-standing and direct involvement in drug
10 dealing and selling weapons, past interactions with Petitioner at his home, a propensity for
11 violence, and that he was known to answer the door armed. Petitioner is correct that the
12 prosecutor repeatedly asserted that Mary had been tortured in his penalty phase arguments
13 to the jury, but the jury was entitled to consider the circumstances of the crime itself in
14 making their penalty phase decision. The plain facts were that the crimes were extremely
15 brutal and amounted to significant evidence in aggravation even in the absence of a specific
16 definition of torture, as Mary suffered numerous blunt force injuries to her head and back
17 prior to her death, as well as several gunshot wounds, including one to the back of the head.
18 Her 3 year old son was shot and was likely nearby at the time of his wounding and her
19 death. Her husband had also been shot and killed. In light of the substantial evidence in
20 aggravation from the crimes alone, Petitioner fails to carry the “heavy burden” of
21 demonstrating that the absence of specific instruction on torture resulted in prejudice. See
22 Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997) (“An omission, or an incomplete
23 instruction, is less likely to be prejudicial than a misstatement of the law’ and, thus, a
24 habeas petitioner whose claim involves a failure to give a particular instruction bears an
25 ‘especially heavy burden.’”), quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977). In
26 the absence of any record indication that the instructions were confusing, or any showing
27 aside from Petitioner’s own speculation that the jurors relied on an inaccurate
28 understanding of the term torture in rendering their verdict, the Court cannot conclude that

1 the asserted error resulted in prejudice. Petitioner fails to demonstrate that the trial court's
2 failure to define torture "had substantial and injurious effect or influence in determining
3 the jury's verdict" at either the guilt or penalty phases. Brecht, 507 U.S. at 637.

4 Because Petitioner fails to show that the state court adjudication of this claim was
5 contrary to, or an unreasonable application of, clearly established federal law, or that it was
6 based on an unreasonable determination of the facts, and because any error is harmless,
7 habeas relief is unavailable as to Claim 8.

8 **5. Claim 9**

9 Petitioner asserts that the trial court violated his due process rights by erroneously
10 instructing the jury regarding the special circumstance allegations, which reduced the
11 mental state required for aiding and abetting liability, in violation of ex post facto laws.
12 (SAP at 52-53.)

13 The California Supreme Court considered and rejected this claim on direct appeal,
14 as follows:

15 Defendant filed a pretrial motion seeking dismissal of the special
16 circumstance allegations on the ground they were an ex post facto application
17 of the laws and therefore a violation of his state and federal rights to due
18 process. The trial court denied the motion. On appeal, defendant contends the
19 trial court erred in denying the motion and as a consequence violated his right
20 to due process of law under the Fifth and Fourteenth Amendments to the
United States Constitution. For the reasons discussed below, we discern no
error and no violation of defendant's due process rights.^{FN8}

21 FN8. Regarding this claim and most other claims raised on
22 appeal, defendant contends that the asserted error or misconduct
23 violated several constitutional rights. In many instances in which
24 defendant raised issues at trial, however, he failed explicitly to
make some or all of the constitutional arguments he now asserts
25 on appeal. Unless otherwise indicated, his appellate claims either
required no action by defendant to preserve them, or involved
26 application of the same facts or legal standards defendant asked
the trial court to apply, accompanied by a new argument that the
27 trial error or misconduct had the additional *legal consequence* of
violating the federal Constitution. To that extent, defendant has

1 not forfeited his new constitutional claims on appeal. (*People v.*
2 *Guerra* (2006) 37 Cal.4th 1067, 1084, fn. 4, 40 Cal.Rptr.3d 118,
3 129 P.3d 321.) On the merits, no separate constitutional
4 discussion is required, or provided, where rejection of a claim
5 that the trial court erred on the issue presented to that court
6 necessarily leads to rejection of any constitutional theory or
“gloss” raised for the first time here. (*People v. Boyer* (2006) 38
Cal.4th 412, 441, fn. 17, 42 Cal.Rptr.3d 677, 133 P.3d 581.)

7 Defendant was charged with robbery and burglary special
8 circumstances under section 190.2, as amended in 1990 by Proposition 115.
9 Defendant contends that because this court decided the constitutionality of
10 Proposition 115’s amendments to section 190.2 *after* the commission of his
11 crimes, charging the special circumstances violated the *ex post facto* clauses
12 of the state and federal Constitutions. He also contends the special
circumstances charges denied him due process because he lacked notice that
he could be charged with the special circumstances.

13 Addressing defendant’s claim requires a brief review of the history of
14 Proposition 115. In June 1990, the electorate passed both Propositions 114
15 and 115, which contained different versions of section 190.2. (*People v.*
16 *Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1545, 28 Cal.Rptr.2d 46
17 (*Clark*).) Under the Proposition 114 version of section 190.2, the Legislature
18 required a finding of intent to kill before the trier of fact could impose the
death penalty on one who was not the actual killer. (*Clark, supra*, 22
Cal.App.4th at pp. 1544–1545, 28 Cal.Rptr.2d 46.) Under the Proposition 115
version of section 190.2, however, the felony-murder rule applied, with no
required finding that a defendant had an intent to kill. (*Ibid.*) The passage of
Propositions 114 and 115 spawned litigation that challenged whether
Proposition 115’s amendments to section 190.2 were effective. (*Clark*, at p.
1546, 28 Cal.Rptr.2d 46.) On June 25, 1992, we settled this issue in *Yoshisato*
v. *Superior Court* (1992) 2 Cal.4th 978, 992, 9 Cal.Rptr.2d 102, 831 P.2d 327.
Yoshisato held that Proposition 115’s amendments to section 190.2 were
operative, and went into effect the day of Proposition 115’s passage in June
1990. The crimes in the present case were committed on May 26–27, 1992.

25 Defendant contends that the law was “unsettled” for the two-year
26 period between the passage of Proposition 115 in June 1990, and our decision
27 in *Yoshisato* on June 25, 1992, and that he lacked notice that a death judgment
28 was proper in light of the actions constituting the two special circumstances
charged. Defendant concedes that his argument fails under *Clark, supra*, 22

1 Cal.App.4th at page 1541, 28 Cal.Rptr.2d 46. He apparently asks us to
2 disapprove that case.

3 We decline to do so. As *Clark* observed, both the United States and
4 California Constitutions forbid only ““the retroactive application of an
5 “unexpected” or “unforeseeable” judicial enlargement of a criminal statute.””
6 (*Clark, supra*, 22 Cal.App.4th at p. 1550, 28 Cal.Rptr.2d 46.) Our decision in
7 *Yoshisato* was neither “unexpected” nor “unforeseeable”; all that can be said
8 of the state of the law during the two-year period was that it was “unsettled.”
9 (*Clark, supra*, 22 Cal.App.4th at p. 1550, 28 Cal.Rptr.2d 46.) Defendant
10 therefore was on notice that this court might find (as indeed we did) that the
provisions of Proposition 115 were controlling. Consequently, the trial court
did not err in denying defendant’s motion to dismiss the special
circumstances.

11 Hoyos, 41 Cal. 4th at 889-90

12 ““[A]ny statute which punishes as a crime an act previously committed, which was
13 innocent when done; which makes more burdensome the punishment for a crime, after its
14 commission, or which deprives one charged with crime of any defense available according
15 to law at the time when the act was committed, is prohibited as *ex post facto*.”” Collins v.
16 Youngblood, 497 U.S. 37, 42 (1990), quoting Beazell v. Ohio, 269 U.S. 167, 169-70
17 (1925); see also Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (“An *ex post facto*
18 law has been defined by this Court as one that makes an action done before the passing of
19 the law, and which was innocent when done, criminal; and punishes such action, or that
20 aggravates a crime, or makes it greater than it was, when committed.”) (internal quotations
21 omitted).

22 Of particular relevance to the instant claim, the Supreme Court has also stated that
23 “[i]f a judicial construction of a criminal statute is unexpected and indefensible by
24 reference to the law which had been expressed prior to the conduct in issue, [the
25 construction] must not be given retroactive effect.” Rogers v. Tennessee, 532 U.S. 451,
26 457 (2001), quoting Bouie, 378 U.S. at 354 (internal quotations omitted) (brackets in
27 original).

28 ///

1 As the state supreme court noted above, Propositions 114 and 115 each proposed
2 revisions to California Penal Code section 190.2, and both passed in the June 1990 election,
3 with Proposition 114 receiving a larger percentage of favorable votes. Petitioner asserts
4 that: “At the time of the homicides on May 26-27, 1992, it was reasonable to believe that
5 the special circumstance elements contained in Proposition 114 were the law of the state,
6 because that proposition received more votes. However, on June 25, 1992, after the
7 homicides in this case, the California Supreme Court held in Yoshisato v. Superior Court,
8 2 Cal.4th 978 (1992) that Proposition 115, ‘reckless disregard’ mens rea was the law of the
9 state, notwithstanding that Proposition 115 had received fewer votes.” (SAP at 52.)
10 Petitioner argues that he was prejudiced “because his convictions for first-degree murder
11 could have been predicated on conspiracy liability without any determination of his actual
12 mental state. Subsequently, the jury could have found the special circumstances allegations
13 true based solely on the mental state that he acted in reckless disregard of human life,” and
14 argues that the jurors “would not likely have found the special circumstances allegations
15 true if they had been instruct [sic] that the prosecution had to prove that he harbored express
16 malice.” (Id. at 53.)

17 After reviewing the law in existence at the time of the crimes in this case, it is evident
18 that the California Supreme Court’s decision in Yoshisato was neither “unexpected” nor
19 “indefensible.” Proposition 115 had been subject to multiple challenges before Yoshisato,
20 and had been twice upheld by the state supreme court. In Raven v. Deukmejian, 52 Cal.
21 3d 336 (1990), the California Supreme Court rejected a contention that Proposition 115
22 violated the single subject rule and upheld the majority of the proposition, including the
23 provisions relevant to this claim. See id. at 349, 356. Meanwhile, in Tapia v. Superior
24 Court (People), 53 Cal. 3d 282 (1991), the California Supreme Court held that only “certain
25 provisions addressing the conduct of trials, and certain other provisions changing the law
26 to the benefit of defendants” were applicable retrospectively to crimes committed prior to
27 the effective date of the proposition, while “[t]he remainder of the measure’s provisions
28 may not.” Id. at 286.

1 “The critical question is whether the law changes the legal consequences of acts
2 completed before its effective date.” Weaver v. Graham, 450 U.S. 24, 31 (1981). At the
3 outset of the Tapia decision, the state supreme court indicated that “Proposition 115 took
4 effect on June 6, 1990, the day after the voters approved the measure.” Id. at 286. In
5 holding that the provisions which increased the punishment of certain criminal behavior
6 could only apply prospectively, explicitly citing the relevant portion of section 190.2 which
7 “provides that an accomplice, for a felony-murder special circumstance to be found true,
8 must have been a major participant and have acted with reckless indifference to human
9 life,” the state court reasoned that “[a]pplication of these provisions to crimes committed
10 before the measure’s effective date would be ‘retrospective’ because each would change
11 the legal consequences of the defendant’s past conduct.” Tapia, 53 Cal.3d at 298, quoting
12 Weaver, 450 U.S. at 31. The California Supreme Court specifically noted that “these
13 provisions may only be applied to prosecutions of crimes committed on or after June 6,
14 1990.” Tapia, 53 Cal. 3d at 299. Again, the crimes at issue in this case took place on May
15 26-27, 1992, nearly two years after the passage of Proposition 115 and over a year after
16 Tapia.

17 To the extent Petitioner relies on the state appellate court’s August 5, 1991 Yoshisato
18 decision, which concluded that Proposition 115 never became effective, that argument is
19 unavailing. In 1991, the California Court of Appeal heard a challenge to Proposition 115
20 similar to the argument advanced here - that Proposition 114, having received more votes,
21 was the effective law. As the appellate court acknowledged, the superior court rejected
22 that contention, concluding that: ““Neither Proposition 114 nor the relevant provisions of
23 Proposition 115 purported to create a comprehensive regulatory scheme,”” and reasoning
24 that: ““The will of the voters who approved both measures can be given effect.”” Yoshisato
25 v. Superior Court (People), 284 Cal.Rptr. 182, 184 (Cal. Ct. App. 1991). The state
26 appellate court disagreed with the superior court and held that: “Since Proposition 114
27 received more votes, Proposition 115’s rendition of section 190.2 never became operative.”
28 Id. at 183. But on October 24, 1991, over six months prior to the crimes at issue here, the

1 California Supreme Court granted review of the appellate court's decision. See Yoshisato
2 v. Superior Court (People), 818 P.2d 63 (1991). Thus, given the clear existence of
3 conflicting opinions on this very matter, coupled with two prior California Supreme Court
4 decisions upholding Proposition 115 and the pending review of the appellate court's ruling,
5 it was not only foreseeable, but likely, that the state supreme court would again uphold
6 Proposition 115. See e.g. United States v. Rodgers, 466 U.S. 475, 484 (1984) ("And any
7 argument by respondent against retroactive application to him of our present decision, even
8 if he could establish reliance upon the earlier . . . decision, would be unavailing since the
9 existence of conflicting cases from other Courts of Appeals made review of that issue by
10 this Court and decision against the position of the respondent reasonably foreseeable.")
11 Indeed, the California Supreme Court upheld Proposition 115, rejecting the argument that
12 114 and 115 were in conflict, and reasoning that the two propositions "sought to amend
13 section 190.2 in complementary or supplementary fashion." Yoshisato, 2 Cal. 4th at 990.

14 Ultimately, Petitioner fails to demonstrate that the California Supreme Court's
15 Yoshisato ruling was either "unexpected" or "indefensible" in light of Tapia and the other
16 cases discussed above. See Rogers, 532 U.S. at 457, quoting Bouie, 378 U.S. at 354.
17 Accordingly, the California Supreme Court reasonably found that the Yoshisato decision
18 was "neither 'unexpected' nor 'unforeseeable'" and that the application of Proposition 115
19 to Petitioner's case did not run afoul of the ex post facto prohibition. Because Petitioner
20 fails to show that the state court adjudication of this claim was contrary to, or an
21 unreasonable application of, clearly established federal law, or that it was based on an
22 unreasonable determination of the facts, habeas relief is not warranted on Claim 9.

23 **6. Claim 10**

24 Petitioner contends the trial court erred in allowing the testimony of Brian Kennedy
25 about blood spatter in the victims' home and trace blood evidence, arguing that the
26 "unreliability of Kennedy's testimony and his bias in favor of the prosecution were of such
27 magnitude that its admission rendered the trial fundamentally unfair." (SAP at 54-55.)

28 ///

1 The state supreme court considered and rejected this claim on direct appeal, as
2 follows:

3 Defendant contends that prosecution blood spatter expert witness,
4 Deputy Sheriff Brian Kennedy, was biased and lacked proper qualification as
5 an expert. He claims Kennedy's testimony (on crime reconstruction using
6 blood spatter analysis) violated defendant's constitutional rights to a fair trial,
7 due process of law, and a reliable penalty determination. The testimony
8 described the blood spatter patterns the killings caused, other transfers of
9 blood (including "castoffs," "wipes," and drip trails), and blood pooling in
10 Daniel Magooon's body. Defendant further contends the court violated
11 Evidence Code section 402 and his federal due process rights when it deferred,
12 until midtrial, any rulings on the admissibility of Kennedy's testimony. For
13 the reasons discussed below, we conclude no error occurred.

14 The parties discussed the admissibility of Kennedy's testimony during
15 in limine motions. Defense counsel made an oral objection to the testimony
16 under *People v. Kelly* (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240
17 and *Frye v. United States* (D.C.Cir.1923) 293 F. 1013, raising the issue of
18 whether Kennedy had used correct procedures.^{FN20} The court ruled that *Kelly*
19 was inapplicable to Kennedy's testimony. After reviewing Kennedy's resume,
20 the trial court stated that there was no need to have an Evidence Code section
21 402 hearing on Kennedy's qualifications, because Kennedy appeared
22 qualified. The trial court noted that the defense would have the opportunity to
23 voir dire Kennedy at trial to confirm his qualifications. At trial, defense
24 counsel did not object to Kennedy's testimony.

25 FN20. Because the United States Supreme Court
26 abrogated the *Frye* formulation in federal trials in 1993, this rule
27 should more accurately be referred to now as the *Kelly* rule. (See
28 *People v. Leahy* (1994) 8 Cal.4th 587, 591, 34 Cal.Rptr.2d 663,
882 P.2d 321.)

29 As a preliminary matter, the People assert that defendant forfeited his
30 claims because he failed to object to Kennedy's testimony either on the ground
31 that he was biased or that he lacked proper qualifications as an expert.
32 Defendant replies that trial counsel's objection on *Kelly* and *Frye* grounds to
33 the scientific validity of the procedures followed by Kennedy is sufficient to
34 preserve the issue on appeal.^{FN21} But because the objection below neither
35 explicitly nor implicitly raised the issues of Kennedy's bias or lack of
36 qualification, we conclude that defendant did forfeit the claims. (*People v.*

¹⁰ Jenkins (2000) 22 Cal.4th 900, 1000, 95 Cal.Rptr.2d 377, 997 P.2d 1044.)

FN21. Defendant appears to refer to the *Kelly/Frye* objection below to support his contention that Kennedy lacked proper expert qualification and was biased in the prosecution's favor. He does not raise a *Kelly* rule issue on appeal. A *Kelly* rule claim would be unavailing in any case, as we have held that *Kelly* is inapplicable to blood spatter testing. (*People v. Clark* (1993) 5 Cal.4th 950, 1018, 22 Cal.Rptr.2d 689, 857 P.2d 1099.)

Even assuming that defendant's claims were not forfeited, we find them without merit. A claim that expert opinion evidence has been improperly admitted is reviewed under the deferential abuse of discretion standard. (*People v. Panah* (2005) 35 Cal.4th 395, 478, 25 Cal.Rptr.3d 672, 107 P.3d 790.) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows the witness ""*clearly lacks* qualification as an expert.""" [Citation.]" (*People v. Farnam, supra*, 28 Cal.4th at p. 162, 121 Cal.Rptr.2d 106, 47 P.3d 988.) The record does not show that Kennedy lacked expert qualifications. Kennedy received a bachelor's degree in Police Science and Management and after becoming a police officer took supplemental courses in crime scene reconstruction and bloodstain patterns. He lectured on blood spatter evidence at an in-service school for criminal investigators and prosecutors at San Jose State University. He had testified regarding blood spatter evidence in superior courts throughout the state on numerous occasions. He conducted blood spatter analysis for the Sacramento Sheriff's Department and went to homicide scenes. Kennedy's educational background and work experience fully qualified him to testify as an expert on blood spatter evidence. (See *People v. Combs* (2004) 34 Cal.4th 821, 849, 22 Cal.Rptr.3d 61, 101 P.3d 1007.)

Defendant contends that Kennedy was biased because his report included a section called "The Bludgeoning," in which he opined that the eight cast-off bloodstains in the hallway were likely caused by repeated blows to Mary Magoon's head by an instrument consistent with a nine-millimeter handgun. The serology reports, however, showed that the blood at issue was not Mary Magoon's; it was D.'s.^{FN22} Defendant implies this discrepancy shows Kennedy's bias against the defendant in the face of scientific evidence to the contrary. But the explanation for the apparent conflict, as Kennedy testified at trial, was that his deadline for submitting the findings to the district attorney's office required him to write his report before the serology tests had been completed, and he was asked to outline as many possibilities as he could,

1 including the possibility that the blood in the hallway was Mary Magoon's.
2 After the serology tests were returned, and prior to trial, Kennedy sought to
3 redact the pages of the report that dealt with the bludgeoning in the hallway,
4 but the trial court ruled that Kennedy's entire report was the fair subject of
any regard.

5 FN22. D. was not injured during the murders. His cast-off
6 bloodstains in the hallway apparently predated the murders.

7 In addition, we find no merit in defendant's contention that the trial
8 court violated Evidence Code section 402 and defendant's due process rights
9 when it deferred until midtrial any rulings on the admissibility of Kennedy's
10 testimony. The trial court did not defer its Evidence Code section 402 rulings
11 until midtrial; it made pretrial rulings on the two preliminary facts raised,
12 which were the scientific reliability of blood spatter testing (the *Kelly* rule
objection), and Kennedy's qualifications to testify as an expert witness.^{FN23}

13 FN23. Evidence Code section 400, et seq. set forth rules
14 for determining the existence or nonexistence of a preliminary
15 fact "when the existence of a preliminary fact is disputed."
(Evid.Code, § 402, subd. (a).) A "'preliminary fact' means a fact
16 upon the existence or nonexistence of which depends the
17 admissibility or inadmissibility of evidence." (Evid.Code, §
400.)

18 Defendant contends the court should have held an evidentiary hearing
19 before Kennedy was allowed to testify. The claim has no merit. Kennedy's
20 resume sufficiently established his qualifications. In addition, the court
21 correctly concluded that blood spatter testing does not require *Kelly* scrutiny.
(*People v. Clark, supra*, 5 Cal.4th at p. 1018, 22 Cal.Rptr.2d 689, 857 P.2d
1099.) We therefore conclude no error occurred when the court admitted
22 Kennedy's expert testimony.

23
24 Hoyos, 41 Cal. 4th at 909-11 (brackets in original). The state supreme court also rejected
25 Petitioner's contention that the trial court's ruling resulted in prejudice with respect to his
26 penalty phase proceedings. See id. at 927 fn. 38 ("Because we discern no error in any area
27 of the guilt phase, we reject defendant's claims of any prejudicial effect in the penalty phase
28 arising from these or any other guilt phase rulings.")

1 As noted above, a claim of state law error arising from the erroneous admission of
2 evidence may warrant habeas relief only if “the admission of the evidence so fatally
3 infected the proceedings as to render them fundamentally unfair.” Jammal, 926 F.2d at
4 919; see also McGuire, 502 U.S. at 68-73.

5 The California Supreme Court was not unreasonable in rejecting this claim on the
6 basis that, even assuming Petitioner did not forfeit the claim by failing to object to
7 Kennedy’s alleged bias or lack of qualifications to testify as an expert, the trial court did
8 not err in allowing Kennedy to testify.

9 With respect to the area of anticipated expert testimony, the trial court noted that
10 Kelly/Frye did not appear to apply to blood spatter evidence, as the proposed testimony
11 “seem[s] to be based on expertise of an experienced detective, a number of seminars and
12 training sessions concerning blood spatter and physics, and the law of physics have been
13 around for an awful long time.” (RT 1201.) With respect to Kennedy in particular, the
14 trial court reasoned that: “From the standpoint of qualifications, taken at face value, Mr.
15 Kennedy seems to be a person of some substantial experience in law enforcement. He has
16 taken a number of courses concerning this topic and seems to be qualified to express
17 opinions in this area.” (RT 1201-02.) Thus, the trial court thoroughly reviewed Kennedy’s
18 qualifications, as well as his report and notes, prior to allowing his testimony.

19 The second component of Petitioner’s claim is that Kennedy was biased in favor of
20 the prosecution, further undermining the reliability of his testimony when coupled with his
21 lack of qualifications, and that the trial court erred in admitting the expert testimony. As
22 an initial matter, Petitioner fails to cite to any clearly established law supporting his
23 contention that an expert’s purported bias constitutes grounds for excluding such
24 testimony. See e.g. United States v. Abonce-Barrera, 257 F.3d 959, 965 (9th Cir. 2001)
25 (“Generally, evidence of bias goes toward the credibility of a witness, not his competency
26 to testify, and credibility is an issue for the jury.”); United States v. Preciado-Gomez, 529
27 F.2d 935, 942 (9th Cir. 1976) (“The existence of bias or prejudice of one who has expressed
28 an expert opinion can always be examined into on the cross-examination of such expert; as

1 well as the facts upon which his expert opinion was based.”) In any event, Petitioner also
2 fails to demonstrate that Kennedy was biased in favor of the prosecution. Petitioner points
3 to a portion of Kennedy’s report entitled “The Bludgeoning,” in which Kennedy offers
4 analysis indicating that cast-off bloodstains found on a wall and door to the master bedroom
5 were created when Mary Magoon sustained blunt force injuries from an instrument
6 consistent with a handgun. Because testing later revealed the bloodstains in question were
7 not from victim Mary Magoon, Petitioner asserts that the report confirms Kennedy’s bias
8 against the defense and the falsity of his testimony.

9 However, as the trial court and the California Supreme Court each thoroughly
10 discussed, Kennedy clearly stated that he submitted his report prior to the completion of
11 serology tests and in fact sought to redact that portion of his report once the results showed
12 the blood did not belong to Mary Magoon. (See RT 3543-44); Hoyos, 41 Cal. 4th at 910-
13 11. The trial court indicated that “this type of opinion is one that an expert is a [sic] entitled
14 to express in [sic] the basis of a hypothetical. And that’s essentially what he has done.
15 He’s said assuming all the blood on the premises belong to one person, why, these would
16 be my opinions. And that is what he said. He conditioned his opinions on the hypothetical.
17 He underlines it in his report.” (RT 3544.) Indeed, Kennedy’s report includes an
18 underlined section, prior to the discussion of the blood in the hallway area, stating that:
19 “Due to the time constraints of the Court, the following assessment of bloodstain patterns
20 is being made prior to the return of all the presumptive and serological tests requested of
21 stains suspected to be blood. The following is based on the assumption that all stains
22 addressed are blood, and the person to whom a pattern is attributed is based upon the
23 consistency of the type of pattern and the injuries suffered. Upon receipt of completed
24 serological tests the opinions expressed may be subject to modification.” (Lodgment No.
25 112, Ex. 76 at 8.) In admitting the testimony and report, the trial court ruled that Kennedy
26 could be subject to questions concerning the entire report, including “The Bludgeoning”
27 section, noting that “everything contained within this report is fair game.” (RT 3546.) In
28 fact, both Petitioner’s defense counsel and co-defendant’s counsel cross-examined

1 Kennedy extensively on the matter. (See RT 3639-48, 3648-55, 3659-62.)

2 For instance, counsel elicited that the blood Kennedy ascribed in his report as being
3 cast-off stains from head injuries sustained by Mary Magoon, instead actually “doesn’t
4 belong to anybody who died in this house.” (RT 3645.) Kennedy stated that he had no
5 way of knowing the age of the bloodstains and had to assume it was part of the crime scene,
6 and explained that while the crime occurred in 1992, “I was on the scene in ‘93, a year
7 later; and this was a very dark hallway, and the people that were living in the house didn’t
8 even know the stains were there because it was so dark. For me to assume the age of that
9 stain in a crime scene that’s over a year old would have been very irresponsible on my part
10 not to assess it as part of the crime scene until proved otherwise.” (RT 3647.)

11 As for the portion of his report titled “The Bludgeoning,” Kennedy testified that “all
12 I had was stain on a wall and head injuries to a person who was mobile in the crime scene
13 at one time. So I had to put two and two together. I preface the entire report with the fact
14 that I did not have serology results back that I had requested, and that I was required by the
15 Court to author this report prior to the results of the serology.” (RT 3647-48.) On cross-
16 examination, Kennedy admitted the title of that section “was probably a poor choice of
17 words. I just used that as a break in the report to assess that as possibly part of the
18 bludgeoning.” (RT 3648.) During redirect, Kennedy explained that “I was told that due
19 to time constraints set by the Court that I was to give as much of an assessment as I possibly
20 could and outline as many possibilities as were indicated.” (RT 3655.) On recross,
21 Kennedy was again questioned about the title of the section and stated simply that: “I
22 labeled it as a bludgeoning because I had a victim who has been bludgeoned.” (RT 3661.)
23 When counsel inquired further, asking if Kennedy made a “great big mistake in that
24 conclusion,” Kennedy again indicated that: “In maybe terming - - putting that term as a
25 topic for that group of paragraphs, maybe I made a mistake in choice of words.” (RT
26 3661.)

27 The trial court clearly considered Kennedy’s qualifications and the substance of his
28 testimony, and did not abuse its discretion in admitting the evidence. Petitioner fails to

offer any authority supporting his contention that an expert's alleged bias constitutes grounds for excluding such testimony. The record also reflects that the defense had, and utilized, the opportunity to cross-examine Kennedy on the basis of his opinions and specifically on the contested section of his report concerning the blunt force injuries suffered by Mary Magoon.

Based on a review of this record, the California Supreme Court reasonably concluded that Kennedy was qualified to testify and that "no error occurred" in admitting his testimony. Hoyos, 41 Cal. 4th at 911. Petitioner fails to demonstrate that the admission of Kennedy's testimony deprived Petitioner of his due process rights to a fair trial or rendered his trial "fundamentally unfair." Jammal, 926 F.2d at 919. The California Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established law, nor was it based on an unreasonable determination of the facts. Habeas relief is not warranted on Claim 10.

7. Claim 11

Petitioner asserts that the admission of numerous graphic photos, which "depicted close-ups of bloody wounds from the crime scene, and also included autopsy photos," rendered his trial unfair and violated his right to due process. (SAP at 56.)

On direct appeal, the California Supreme Court considered and rejected this claim as follows:

Defendant contends that the trial court erred when it admitted crime scene and autopsy photographs, and in so doing violated his constitutional rights to a fair trial, due process of law, and a reliable sentence. Having viewed the photographs, and for the reasons discussed below, we conclude the court neither abused its discretion nor violated defendant's constitutional rights in admitting the photographs.

Alvarado filed in limine motions, in which defendant joined, to exclude crime scene and victim autopsy photographs as irrelevant, cumulative, and more prejudicial than probative. At a pretrial hearing, the trial court examined the photographs, and admitted some while excluding others. Defendant apparently challenges all of the photographs admitted over defense objection, and claims they were not relevant or, in the alternative, that they were

1 cumulative and inflammatory. (Evid.Code, § 352.)

2 In determining whether there was an abuse of discretion, we address
3 two factors: (1) whether the photographs were relevant under Evidence Code
4 section 210, and (2) if they were relevant, whether the trial court abused its
5 discretion under Evidence Code section 352 in finding that the probative value
6 of the evidence was not substantially outweighed by the probability that its
7 admission would create a substantial danger of undue prejudice. (*People v.*
8 *Carter* (2005) 36 Cal.4th 1114, 1166, 32 Cal.Rptr.3d 759, 117 P.3d 476.)
9 Defendant presents no credible argument that the photographs were irrelevant.
The photos were clearly relevant to the determination of many disputed facts
in this case including how the victims were killed and what happened prior to
the killings. (Evid.Code, § 210.)

10 Nor did the trial court abuse its discretion in determining that the
11 probative value of each photograph was not substantially outweighed by its
12 prejudicial effect. “The admission of photographs of a victim lies within the
13 broad discretion of the trial court when a claim is made that they are unduly
14 gruesome or inflammatory. [Citations.] The court’s exercise of that discretion
15 will not be disturbed on appeal unless the probative value of the photographs
16 clearly is outweighed by their prejudicial effect. [Citations.]” (*People v.*
17 *Ramirez* (2006) 39 Cal.4th 398, 453–454, 46 Cal.Rptr.3d 677, 139 P.3d 64,
18 quoting *Crittenden*, *supra*, 9 Cal.4th 83 at pp. 133–134, 36 Cal.Rptr.2d 474,
19 885 P.2d 887.) We have examined the photographs and conclude they are not
of such a nature as to overcome the jury’s rationality. (*People v. Gurule* (2002)
28 Cal.4th 557, 625, 123 Cal.Rptr.2d 345, 51 P.3d 224.) The trial court did
not err in admitting the challenged photographs of the victims, nor did their
admission violate defendant’s constitutional rights.

20 Hoyos, 41 Cal. 4th at 908-09 (brackets in original). The state supreme court also rejected
21 Petitioner’s contention that the trial court’s ruling resulted in prejudice with respect to his
22 penalty phase proceedings. See id. at 927 fn. 38 (“Because we discern no error in any area
23 of the guilt phase, we reject defendant’s claims of any prejudicial effect in the penalty phase
24 arising from these or any other guilt phase rulings.”)

25 Again, a claim of state law error arising from the erroneous admission of evidence
26 may warrant federal habeas relief only if “the admission of the evidence so fatally infected
27 the proceedings as to render them fundamentally unfair.” Jammal, 926 F.2d at 919; see
28 also McGuire, 502 U.S. at 68-73.

1 In the SAP, Petitioner advanced a general challenge to the admission of crime scene
2 and autopsy photos at trial, which he asserts was prejudicial in conjunction with the
3 testimony of Brian Kennedy. (SAP at 56.) In the merits and evidentiary hearing briefing,
4 Petitioner states specifically that “[t]rial counsel emphasized photographs 8A and 11C as
5 particularly irrelevant, offensive, and inflammatory, but the trial court found that each was
6 necessary to illustrate the testimony of Kennedy, as noted above.” (Pet. Brief at 19.)
7 Petitioner argues that because “most of the inflammatory crime scene photos were admitted
8 in conjunction and as support for Brian Kennedy’s tainted testimony,” the photos
9 themselves “were similarly tainted.” (Id.)

10 Yet, as discussed above, Petitioner fails to demonstrate that the trial court erred in
11 admitting the expert testimony of Detective Kennedy or that the admission of his testimony
12 deprived Petitioner of a fair trial. Accordingly, this claim must be viewed on its own
13 merits, given the lack of demonstrated error in admitting Kennedy’s testimony.

14 Counsel for Petitioner’s co-defendant filed a pre-trial motion to exclude photos of
15 the victims, joined by Petitioner. (CT 516-31, 814-15.) In the motion, the defense argued
16 that “the introduction of any and all such photographs is irrelevant,” and “is more
17 prejudicial than probative,” specifying that the motion was directed at “[p]hotographs of
18 the alleged victims taken while they were alive,” “photographs showing the victims’
19 injuries, which were taken at the scene of the investigation, or during any additional
20 investigation,” and “certain photographs taken at and during the autopsy of the alleged
21 victims, Dan and Mary Magoon.” (CT 517-18, 523-24.)

22 The trial court and counsel engaged in extended discussions on the admissibility of
23 a number of photos, with the trial court excluding or redacting portions of several photos.
24 For instance, the trial court redacted a portion of one photo that displayed a family photo
25 in the living room and excluded several photos as cumulative to those already admitted
26 into evidence. (RT 1117-19, 1143, 1148-49, 1163.) With respect to the specific photos
27 mentioned by Petitioner, the defense objected to photo 8A which depicted the “victim’s
28 wallet, which has been opened up and contents removed” but also showed a large pool of

1 blood. (RT 1120-21.) In response, the prosecutor cited to Kennedy's expected testimony
2 about "the relevance of the pool of blood" as well as "the way the blood dried and the
3 smear pattern" which showed how long the victim was laying on his side prior to being
4 rolled, which allowed the perpetrators access to the entryway to the garage containing the
5 marijuana taken from the premises. (RT 1121-22.) With respect to photo 11C, the defense
6 contended the photo was "so graphic that it is going to be inherently offensive and
7 overwhelming to jurors" while the prosecutor countered that in that photo "you can see
8 how the blood dried and how there was various swipe marks caused by the opening of the
9 door and the rolling back of the body." (RT 1122-23.) The prosecutor indicated that "Brian
10 Kennedy, this is one of the photos he needs to accurately show that to the jury." (RT 1123.)

11 The trial court admitted the photos, reasoning that: "It seems to me that these two
12 photographs taken together with the offer of proof of the prosecution are highly probative,
13 and the probative value of these photographs would far outweigh any undo [sic] prejudice
14 as that term is defined in law. The photographs seem to me to be part and parcel and
15 essential to the testimony of the witness Kennedy, and for those reasons, the prosecution
16 will be permitted to show these to the jury." (RT 1124.) Kennedy referred to the photos
17 in his testimony about the blood pooling and transfer patterns. (RT 3558-59.) Medical
18 examiner Dr. Mark Super, who viewed the victims at the scene and conducted the autopsies
19 of both victims, also relied on several photos, including 11C, in his testimony. (RT 3573-
20 74.) The record reflects that the photos in question, which depicted not only blood pooling
21 and spatter but also a victim's wallet and indicated that one of the victims was moved after
22 death, arguably in order to gain access to the garage and the marijuana kept there, were
23 relevant to not only the murders, robbery, burglary, drug charges and other charged crimes,
24 but were also relevant to the jury's consideration of the special circumstances of multiple
25 murder and murder in the course of a robbery and burglary. See Jammal, 926 F.2d at 920
26 ("Only if there are *no* permissible inferences the jury may draw from the evidence can its
27 admission violate due process.")

28 ///

1 Ultimately, Petitioner fails to show that the admission of the crime scene photos,
2 whether considered independently or in conjunction with the admission of Kennedy's
3 testimony, "so fatally infected the proceedings as to render them fundamentally unfair."
4 Jammal, 926 F.2d at 919; Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) ("A habeas
5 petitioner bears a heavy burden in showing a due process violation based on an evidentiary
6 decision.") The trial court reasonably determined that the photos were probative and that
7 their value was not outweighed by any potential prejudicial impact and this decision did
8 not violate Petitioner's constitutional right to due process. See Gerlaugh v. Stewart, 129
9 F.3d 1027, 1032 (9th Cir. 1997) (admission of "admittedly gruesome photos of the
10 decedent" was not cognizable on federal habeas review and did not "raise[] the spectre of
11 fundamental fairness such as to violate federal due process of law."), citing McGuire, 502
12 U.S. at 67-68; see also Villafuerte, 111 F.3d at 627 (photos depicting the victim's body
13 and blood at the crime scene were relevant and their admission did not violate due process).

14 The California Supreme Court's rejection of this claim was not contrary to, or an
15 unreasonable application of, clearly established federal law, nor was it based on an
16 unreasonable determination of the facts. Habeas relief is unavailable on Claim 11.

17 **8. Claim 12**

18 Petitioner contends that he was never informed of his right to consular assistance
19 under the Vienna Convention, alleging that "[t]he prejudice is readily apparent in this case
20 because he would have immediately contacted the Mexican Consulate if apprised of his
21 right to do so, and with their assistance would have been much more proactive with respect
22 to developing guilt phase defense and penalty phase mitigation with the Mexican Consulate
23 acting in their salutary role as a cultural bridge between Mexican defendants and the United
24 States criminal justice system." (SAP at 57-58.) He maintains that while law enforcement
25 knew at the time of his May 27, 1992 arrest that he was a Mexican national, he was not
26 informed of, or provided, the right to consular assistance, and his first contact with the
27 Mexican Consulate was in September 1993 and was self-initiated. (Id. at 56-57.)

28 ///

1 Petitioner presented this claim to the California Supreme Court as Claim X of his
2 first state habeas petition, where it was denied on the merits without a statement of
3 reasoning. (Lodgment Nos. 106, 118.)

4 As discussed in the Teague section above (see section III.B.2, supra), the Supreme
5 Court has never held that the provisions of the Vienna Convention created individually
6 enforceable rights, much less that such rights could provide a basis for relief on federal
7 habeas review. See e.g., Breard, 523 U.S. at 378 (suggesting generally that “[a]ny rights
8 that the Consul General might have by virtue of the Vienna Convention exist for the benefit
9 of [the foreign country], not for him as an individual.”); Medellin, 544 U.S. at 664 (“[E]ven
10 accepting, *arguendo*, the ICJ’s construction of the Vienna Convention’s consular access
11 provisions [determining, among other issues, that it guaranteed individually enforceable
12 rights], a violation of those provisions may not be cognizable in a federal habeas
13 proceeding.”)

14 As also discussed above, both parties acknowledge the Supreme Court’s decision in
15 Garcia, in which the Court reasserted Medellin’s holding that “[n]either the Avena decision
16 nor the President’s Memorandum purporting to implement that decision constituted
17 directly enforceable federal law.” Garcia, 564 U.S. at 941 (See Pet. Brief at 20; Resp. Opp.
18 at 33.) While Petitioner explicitly acknowledges the absence of any enabling legislation
19 allowing for the enforcement of the provisions contained in the Vienna Convention, he
20 nonetheless argues that “given the continuing political activity in this area, counsel for
21 petitioner maintains his right to relief under this claim in the event that Congress does pass
22 [sic] implementing such legislation,” asserting “the very real possibility that
23 implementation may occur during the course of this litigation.” (Pet. Brief at 20.)

24 Regardless of this possibility, the fact remains that this provision is not individually
25 enforceable at the present time, nor is it even clear that such a claim is cognizable on federal
26 habeas review. See Breard, 523 U.S. at 378; Medellin, 544 U.S. at 664. Given the lack of
27 any compelling authority supporting Petitioner’s claim of error, the Court cannot conclude
28 that the state supreme court’s rejection of this claim was either contrary to, or an

1 unreasonable application of, clearly established federal law or that it was based on an
2 unreasonable determination of the facts. Petitioner is not entitled to habeas relief on Claim
3 12.

4 **C. Claims of Due Process/Brady Violations, IAC Claims, and Related Claims**

5 **1. Claim 13**

6 In this claim, Petitioner argues that he was deprived of due process, his right to
7 testify, and his right to the effective assistance of counsel as a result of the prosecution's
8 failure to disclose the recantation of jailhouse informant George Jimenez in a timely
9 manner. (SAP at 58.) Petitioner requests an evidentiary hearing on this claim. (Id. at 55.)

10 On direct appeal, the state supreme court discussed this claim at length and rejected
11 it, as discussed below:

12 The jury returned its verdicts in the guilt phase on March 7, 1994. The
13 next day, the prosecutor sent defense counsel a copy of a one-page report
14 dated March 7, 1994 prepared by the prosecutor's investigator, David Weil,
15 which described statements Jimenez had made to Weil on September 22,
16 1993, when Weil served a subpoena on Jimenez. Weil's report appeared to
17 undermine the credibility of Jimenez as a potential witness because it noted
18 that Jimenez said his statements to the police about Alvarado's admissions in
19 jail could have been untrue because of drugs Jimenez was taking at the
20 time.^{FN25} As discussed above in part II.C., the trial court had excluded
21 Jimenez's statements from the prosecution's case-in-chief on *Aranda* and
22 *Bruton* grounds, but Jimenez's statements were held admissible for
23 impeachment if Alvarado testified. Neither Alvarado nor Jimenez testified at
24 trial.

25 FN25. Weil's report stated in relevant part: "Jimenez said
26 that he did not want to testify in this matter because he was afraid.
27 He went on to say that he does not remember most of what he
28 told the officers and that he (Jimenez) was taking strong
medication at the time he talked to the authorities. Jimenez made
it known to me that his statement that was recorded earlier could
be misleading or contain falsehoods because of the drugs he was
taking at the time." Jimenez also said "he was concerned for his
safety and the safety of his family if he was compelled to testify."

Both defendant and Alvarado filed written motions seeking a new trial

1 and other relief. They complained that the prosecutor's failure to disclose
2 information affecting Jimenez's credibility violated *Brady v. Maryland*,
3 *supra*, 373 U.S. at page 87, 83 S.Ct. 1194. Defendant's motion included the
4 declaration of his cocounsel, Arturo Herrera, stating that defendant had
5 consistently expressed a desire to testify in his own defense, and that Attorney
Herrera had advised defendant against testifying because Alvarado was not
going to testify.

6 The trial court granted Alvarado's motion for a new trial, reasoning that
7 Jimenez's statements to Weil constituted *Brady* material that the prosecution
8 was obligated to disclose to Alvarado, and that the prosecutor's failure to
provide this information at a critical stage in the proceedings prevented
9 Alvarado's counsel from providing effective representation on the question of
10 whether to testify.^{FN26} (*Brady, supra*, 373 U.S. at p. 87, 83 S.Ct. 1194.) The
trial court denied defendant's motion in all respects.

11 FN26. In granting Alvarado's motion, the trial judge also
12 mentioned that Alvarado's counsel had subpoenaed the sheriff's
13 office for Jimenez's psychiatric and medical record, but had not
14 received them even though Alvarado's counsel had a right to
receive that information.

15 Defendant contends the trial court erred in denying his motion for a new
16 trial because the late disclosure of the Weil report violated his right to due
17 process under *Brady* and his right to the effective assistance of counsel.
18 Defendant claims these constitutional violations rendered his trial
fundamentally unfair and require the court to set aside his verdicts. For the
19 reasons discussed below, we conclude defendant's constitutional rights were
20 not violated, and the trial court did not err in denying defendant's motion for
a new trial.^{FN27}

21 FN27. Defendant's motion for a new trial was based on
22 the constitutional grounds of an asserted *Brady* violation or
23 violation of the right to the effective assistance of counsel. On
24 appeal, a trial court's ruling on a motion for new trial is reviewed
under a deferential abuse of discretion standard. (*People v.*
25 *Coffman and Marlow, supra*, 34 Cal.4th at p. 127, 17 Cal.Rptr.3d
710, 96 P.3d 30.) Its ruling will not be disturbed unless defendant
26 establishes "a manifest and unmistakable abuse of discretion."
(*Ibid.*, quoting *People v. Delgado* (1993) 5 Cal.4th 312, 328, 19
27 Cal.Rptr.2d 529, 851 P.2d 811.) Here, the asserted abuse of

1 discretion is the asserted failure of the trial court to recognize
2 violations of defendant's constitutional rights. Our constitutional
3 analysis below therefore also addresses the abuse of discretion
issue.

4 (1) *Brady v. Maryland*

5 a. *The Brady Standard*

6 In *Brady*, the United States Supreme Court held "that the suppression
7 by the prosecution of evidence favorable to an accused upon request violates
8 due process where the evidence is material either to guilt or to punishment,
9 irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*,
10 373 U.S. at p. 87, 83 S.Ct. 1194.) The high court has extended the prosecutor's
11 duty to encompass the disclosure of material evidence, even if the defense
12 made no request concerning the evidence. (*United States v. Agurs* (1976) 427
13 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342.) The duty encompasses
14 impeachment evidence as well as exculpatory evidence. (*United States v. Bagley* (1985) 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481.) Such
15 evidence is material "only if there is a reasonable probability that, had the
16 evidence been disclosed to the defense, the result of the proceeding would
17 have been different." "A 'reasonable probability' is a probability sufficient to
18 undermine confidence in the outcome." (*Id.* at p. 682, 105 S.Ct. 3375.) "[T]he
19 reviewing court may consider directly any adverse effect that the prosecutor's
20 failure to respond may have had on the preparation or presentation of the
defendant's case." (*In re Brown* (1998) 17 Cal.4th 873, 887, 72 Cal.Rptr.2d
698, 952 P.2d 715, quoting *Bagley, supra*, 473 U.S. at 683, 105 S.Ct. 3375.)
Defendant has the burden of showing materiality. (*In re Sassounian* (1995) 9
Cal.4th 535, 545, 37 Cal.Rptr.2d 446, 887 P.2d 527.)

21 b. *Defendant's Brady Claim*

22 Defendant essentially asserts the *Brady* violation that led the court to
23 grant Alvarado's new trial motion had a spillover effect as to him because he
24 and Alvarado had a strategic understanding that if one defendant testified, the
other defendant would also have to testify. Defendant contends the timely
25 disclosure of the Weil report would have led him to testify due to a change in
this joint defense strategy.

26 As the trial court acknowledged during the hearing on the new trial motions,
27 *Brady* claims typically require showing the different result of the proceeding

1 in terms of the *verdict*, rather than in terms of an intermediate event such as a
2 defendant's testifying. Defendant essentially ignores the issue of how his
3 testimony would have changed the verdict. If, however, defendant cannot
4 establish the materiality of the Weil report even as to the intermediate event
5 of his decision whether to testify, then he has failed to establish the verdict
would have been different. As discussed below, we conclude defendant has
failed to establish materiality even as to his decision whether to testify.

6 *c. Inadmissibility of the Jimenez Statements*

7 Assuming defendant's claim is cognizable under *Brady*, the People
8 pose a further threshold issue in observing that evidence inadmissible at trial
9 is immaterial under *Brady* and, therefore, the failure to disclose such
10 inadmissible evidence is not a *Brady* violation. Defendant concedes that, at
11 the joint trial, Alvarado's purported admissions would have been admissible
12 against Alvarado but inadmissible as hearsay against defendant, and that if
13 defendant's motion for severance had been granted, the Jimenez testimony
14 could not have been admitted at his single trial for any purpose. Defendant
claims, however, that even though the Jimenez testimony was not admissible
against defendant individually, his due process claim must survive.

15 The United States Supreme Court has never announced a bright line
16 rule that only admissible evidence is "material" for purposes of a *Brady*
17 violation.^{FN28} Some federal and state courts, however, have held that unless
18 the undisclosed evidence would have been admissible at trial, it need not have
19 been disclosed under *Brady*.^{FN29} Other courts have rejected admissibility as a
20 prerequisite for determining *Brady*'s applicability, as long as the information
21 would have led to admissible evidence or been useful to the defense in
22 structuring its case.^{FN30} This court has not directly addressed the issue,
23 although we have implied in dicta that admissibility might be a prerequisite to
materiality.^{FN31} In addition, this case presents the additional question of what
aspect of admissibility is a prerequisite to *Brady* materiality in a joint trial:
admissibility at trial generally, or admissibility as to the individual defendant
making the *Brady* claim?

24 FN28. In *Wood v. Bartholomew* (1995) 516 U.S. 1, 6-7,
25 116 S.Ct. 7, 133 L.Ed.2d 1, the United State[s] Supreme Court
26 ultimately found inadmissible polygraph evidence not material
27 under *Brady*. However, *Wood* was not based on a per se rejection
28 of inadmissible evidence as a basis for a *Brady* claim. *Wood*
found the evidence not material because, even based on the

1 assumption that this inadmissible evidence might have led
2 respondent's counsel to conduct additional discovery leading to
3 admissible evidence, the evidence's influence on the outcome of
4 the case was speculative. (*Wood v. Bartholomew, supra*, 516
5 U.S. at p. 6, 116 S.Ct. 7.); see also *Paradis v. Arave* (9th
6 Cir.2001) 240 F.3d 1169, 1178 ([“In *Bartholomew*, the Court did
7 not categorically reject the suggestion that inadmissible evidence
8 can be material under *Brady*, if it could have led to the discovery
9 of admissible evidence.”])

10
11 FN29. See, e.g., *Madsen v. Dormire* (8th Cir.1998) 137
12 F.3d 602, 604 ([inadmissible evidence of forensic chemist's
13 incompetence not material under *Brady*]); see also Gershman,
14 Prosecutorial Misconduct (2d ed.2005) § 5:8, and cases collected
15 therein.

16 FN30. See, e.g., *Paradis v. Arave, supra*, 240 F.3d at page
17 1179 ([prosecutor's notes, although not admissible, could have
18 been used to contradict a key medical witness and nondisclosure
19 was *Brady* violation]); see also Gershman, Prosecutorial
20 Misconduct, *supra*, § 5:8, and cases collected therein.

21 FN31. “Materiality, in turn, requires more than a showing
22 that the suppressed evidence would have been admissible.”
23 (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043, 29 Cal.Rptr.3d
24 16, 112 P.3d 14, cf. *Wood v. Bartholomew, supra*, 516 U.S. at p.
25 2, 116 S.Ct. 7.)

26 Because the evidence on which defendant bases his *Brady* claim was
27 admissible at the joint trial, for the reasons that follow, we conclude defendant
28 may assert a *Brady* claim, even though the evidence was not admissible
against him.^{FN32} The *Brady* standard for materiality states the undisclosed
evidence is to be evaluated in terms of how “the result of the proceeding would
have been different.” (*United States v. Bagley, supra*, 473 U.S. at p. 682, 105
S.Ct. 3375.) In addition, the evidence's materiality “must be evaluated in the
context of the entire record.”” (*In re Brown, supra*, 17 Cal.4th at p. 887, 72
Cal.Rptr.2d 698, 952 P.2d 715, quoting *United States v. Agurs, supra*, 427
U.S. at p. 112, 96 S.Ct. 2392.) In deciding whether asserted *Brady* evidence
is material to defendant's case, it is therefore appropriate to examine the effect
of the evidence on the actual joint proceeding in which defendant was tried.

1 FN32. Thus, we need not and do not reach the issue of
2 whether a *Brady* claim is precluded when the basis of the *Brady*
3 claim is evidence not admissible at trial.

4 *d. The Joint Defense Strategy*

5 Even though defendant's *Brady* claim is not *per se* precluded because
6 the undisclosed evidence was inadmissible against him individually, its
7 inadmissibility highlights the weaknesses in his *Brady* contention. As
8 defendant concedes, Jimenez's statements were admissible only as
9 impeachment evidence against Alvarado, if Alvarado testified. For defendant,
10 unlike Alvarado, there was no direct causal connection between Jimenez's
11 statements and the decision whether or not to testify. If Alvarado testified,
12 Jimenez's statements could have impeached him. But the prosecution could
13 not have impeached defendant with Jimenez's statements, even if Jimenez
14 testified.

15 Defendant contends Jimenez's statements did affect his decision
16 whether to testify because the potential prejudicial impact of the statements
17 on the jury caused him to adopt a joint defense strategy with Alvarado, to the
18 effect that either both or neither of them would testify. During the hearings on
19 the motions for a new trial, defense counsel extensively discussed the
20 reasoning behind this joint defense strategy, which defendant summarizes and
21 adopts on appeal. If the jury heard Jimenez's statements, their impact would
22 be prejudicial not merely on Alvarado but on defendant as well. Defendant
23 was free to testify without causing Jimenez's statements to be admitted, but if
24 he testified, he presumably would say something exculpatory about his
25 participation in the crime. Then more blame might be placed on Alvarado, so
26 Alvarado would feel compelled to testify. Defendant's and Alvarado's
27 defense counsel believed there was no fair way to have only one story
28 presented. Thus, the codefendants had agreed on a both-or-neither approach
to testifying.

29 *e. Impact of the Joint Defense Strategy*

30 Defendant alternatively refers to his understanding with Alvarado on
31 testifying at trial as an agreement and as a trial strategy. To the extent that the
32 defendant implies the existence of a binding agreement, the argument fails.
33 He fails to establish that he formed a binding agreement with Alvarado either
34 by contract or detrimental reliance.^{FN33} The trial court made no findings
35 establishing the existence of a joint defense agreement. To the extent

1 defendant's argument for materiality depends on the existence of a binding
2 agreement, defendant has therefore failed to establish one.

3 FN33. The only factual evidence presented during the new
4 trial motions was the declaration of defendant's trial attorney,
5 Arturo Herrera. His declaration describes defendant's desire to
6 testify and counsel's advice to defendant that, because Alvarado
7 was not going to testify, then neither should he. But this
declaration does not assert (let alone establish) the existence of a
binding agreement.

8 In the alternative, defendant describes his agreement with Alvarado as
9 a trial strategy that each codefendant adopted, based on their shared interest
10 in keeping Jimenez's statements away from the jury.^{FN34} Defendant claims
11 that if the prosecution had timely disclosed the Weil report, it would have
12 changed the joint defense strategy because the information revealed in the
13 report would have undercut Jimenez's credibility. He reasons, therefore, that
neither he nor Alvarado would have been deterred from testifying because
they feared the effect of Jimenez's statements on the jury.

14 FN34. Defendant also briefly mentions his trial counsel's
15 argument that because defendant and Alvarado are brothers-in-
16 law, the codefendants adopted the "both or neither" testifying
17 strategy, at least in part, out of their sense of familial loyalty.
Assuming defendant also raises this argument on appeal, he
18 presents no authority that familial loyalty can establish
materiality under *Brady*.

19 Defendant implies the above trial considerations *necessitated* his
20 adoption of the agreement with Alvarado and corresponding trial strategy. But
21 this strategy was not compelled by necessity, legal or otherwise. Even
22 assuming both codefendants wished to keep Jimenez's statements from the
23 jury, defendant's testifying would not necessarily have caused Alvarado to
24 testify. Alvarado's testifying in response to Jimenez's statements would have
been contingent on the nature of defendant's testimony. If defendant's
25 testimony painted Alvarado in a particularly bad light, Alvarado might have
testified, in order to shift the blame to defendant.

26 It was also possible, however, that Alvarado would not have testified.
27 Before testifying, Alvarado would have considered the consequences of his
28 testimony: leaving defendant's testimony unrebutted, or taking the stand and

1 risk having the jury hear Jimenez's statements. Alvarado could not make that
2 calculation prior to hearing defendant's actual testimony. Neither could
3 defendant know with any certainty in advance what Alvarado would do. There
4 was no *necessary* connection between defendant's testifying and Alvarado's
testifying.

5 In observing that defendant has not shown the legal necessity of the
6 purported joint defense strategy, we do not hold defendant is required to show
7 legal necessity in order to establish his *Brady* claim.^{FN35} Nor do we deny
8 defendant presents reasonable strategic considerations that may *possibly* have
9 been factors in his decision whether or not to testify. But codefendants in
10 many joint trials face difficult tactical choices in deciding how to proceed
11 where multiple considerations are involved. Defendant has shown only the
12 *possibility* that his decision not to testify was a result of strategic
13 considerations made in connection with Jimenez's statements. In other words,
14 defendant has shown only the *possibility* that he would have testified had the
15 Weil report been timely produced. To establish materiality under *Brady*,
16 defendant must do more than establish a *possible* relationship between the
17 Weil report and a different result; he must establish a *reasonable probability*
18 of a different result. "The mere possibility that an item of undisclosed
19 information might have helped the defense, or might have affected the
20 outcome of the trial, does not establish 'materiality' in the constitutional
21 sense." (*United States v. Agurs*, *supra*, 427 U.S. at pp. 109–110, 96 S.Ct.
22 2392.) Ultimately, defendant's contention that the timely disclosure of the
23 Weil report would have resulted in his testifying is based on speculation and
24 fails to establish materiality under *Brady*. (*Brady*, *supra*, 373 U.S. at p. 87, 83
25 S.Ct. 1194; *Wood v. Bartholomew*, *supra*, 516 U.S. at p. 6, 116 S.Ct. 7.)

26 FN35. Alternatively, we need not and do not reach the
27 issue of whether a showing of legal necessity would be sufficient
28 to establish a *Brady* claim under these circumstances.

29 The People raise the related point that considerations entirely
30 independent of Jimenez's statements caused defendant not to testify,
31 regardless of whether the prosecution had disclosed the Weil report. The
32 People point out that if defendant testified, he could have been subject to
33 impeachment by his own prior statements to the police, and his admissions to
34 jailhouse informant Jorge Flores.

35 In response, defendant attempts to discredit the possible influence of
36 these other impeachment sources. Defendant claims his statements to the
37

1 police were not preceded by any *Miranda* warning, were far from a
2 confession, and might have been excluded in any case as being involuntary. It
3 is true that the People have not shown conclusively that these other
4 impeachment factors independently determined defendant's decision not to
5 testify. But neither has defendant conclusively shown these factors could not
6 have done so. The highly speculative nature of any analysis here further
7 supports our conclusion that defendant has failed to establish materiality
8 under *Brady*.

9 *2. Asserted Violation of Right to Effective Assistance of Counsel*

10 In the alternative, defendant asserts that regardless of whether the
11 timely disclosure of the Weil report would have caused him to testify, its late
12 disclosure was prejudicial because it violated his right to receive meaningful
13 guidance from his counsel on whether or not to testify on his own behalf.
14 Defendant relies on cases based on the deficient performance of counsel, such
15 as *Wiggins v. Smith* (2003) 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471,
16 which appear inapplicable to the facts of this case. *Wiggins* addressed whether
17 counsel fulfilled his duty to “make reasonable investigations” into
defendant’s background so that counsel could make a reasonable decision as
to what to offer in mitigation at the penalty phase. (*Id.* at p. 522, 123 S.Ct.
2527.) Defendant does not argue that his trial counsel was deficient because
he failed to uncover the Jimenez impeachment evidence. Thus, in contrast to
Wiggins, there is no issue of trial counsel’s not becoming aware of relevant
evidence through counsel’s failure to conduct a reasonable investigation.

18 Defendant also contends he was in the same situation as Alvarado in
19 regard to the untimely disclosure of the Weil report and consequently he
20 suffered the same interference with his right to receive meaningful guidance
21 from counsel on the issue of whether to testify. But defendant was not in the
22 same situation as Alvarado in relation to the Weil report. As discussed above,
23 Alvarado and defendant stood in different relationships to the Jimenez
24 statements. If Alvarado testified, he faced impeachment with Jimenez’s
25 statements. Defendant, in contrast, could testify without being subject to
impeachment. Defendant attempts to negate this fundamental difference by
claiming that a joint defense strategy committed both codefendants to the
same course of action in testifying—that is, either both would testify, or
neither would. But, as discussed above, defendant has failed to establish a
material connection between Jimenez’s statements and defendant’s decision
to testify. Because there was no material connection, we find no interference
with defendant’s right to counsel based on the late disclosure of the Weil

1 report.

2 *3. Alleged Prosecutorial Misconduct*

3
4 Defendant contends his convictions and sentence should be set aside
5 because the prosecutor engaged in misconduct when he deliberately withheld
6 Weil's report, which rendered the trial fundamentally unfair under the
7 Fourteenth Amendment to the United States Constitution. In addition,
8 defendant contends the trial court erred in finding the prosecutor did not
9 intentionally keep the Weil report secret until after the jury returned the guilty
10 verdict.

11
12 “A prosecutor’s conduct violates the Fourteenth Amendment to the
13 federal Constitution when it infects the trial with such unfairness as to make
14 the conviction a denial of due process. Conduct by a prosecutor that does not
15 render a criminal trial fundamentally unfair is prosecutorial misconduct under
16 state law only if it involves the use of deceptive or reprehensible methods to
17 attempt to persuade either the trial court or the jury.” (*People v. Morales*
18 (2001) 25 Cal.4th 34, 44, 104 Cal.Rptr.2d 582, 18 P.3d 11.) As discussed
19 above, because there was no material connection between the Weil report and
20 defendant’s decision whether or not to testify, we rejected his claims that the
late disclosure of the Weil report violated his constitutional right to due
process under *Brady* or his right to the effective assistance of counsel. This
same lack of material connection likewise causes us to reject his claim that
the late disclosure of the Weil report made his trial fundamentally unfair. As
to whether the prosecutor violated state law by using deceptive or
reprehensible methods, we reject that claim based on the trial court’s finding,
not contradicted in the record, that the prosecutor’s failure to disclose was
unintentional.^{FN36}

21
22 FN36. Prosecutorial misconduct does not require a
23 showing of bad faith. (*People v. Hill* (1998) 17 Cal.4th 800, 822,
24 829, 72 Cal.Rptr.2d 656, 952 P.2d 673.) Thus, in a typical claim
25 of prosecutorial misconduct involving a prosecutor’s
26 presentation to the court or jury, there is no need to address the
27 prosecutor’s intent. But in the context of the prosecutorial
28 misconduct claimed here, the only way the actions of the
prosecutor can be shown to be deceptive or reprehensible is if the
prosecutor had intentionally withheld the Weil report for
strategic advantage. In the absence of claims for intentional
misconduct, defendant would merely be repeating his *Brady*

1 claim, since nondisclosure under *Brady* does not require a
2 showing of the moral culpability or the willfulness of the
3 prosecutor. (*United States v. Agurs, supra*, 427 U.S. at p. 110, 96
S.Ct. 2392.)

4 In describing the circumstances surrounding the late disclosed Weil
5 report, the prosecutor stated that, in September of 1993, after serving the
6 subpoena on Jimenez, Weil told him the following: Jimenez did not want to
7 be a witness; he was scared of what might happen to him or his family; and
8 he might forget what he said or didn't really remember what was said. The
9 prosecutor could not recall if he directed Weil to prepare a report in September
10 of 1993, but he believed a report would be prepared. When the prosecutor was
11 reviewing documents in preparation for the penalty phase, he became aware
12 that no such report had been prepared. The prosecutor then directed Weil to
13 prepare a report and had it delivered to defense counsel. The court made
14 findings in connection with the codefendants' motions for a new trial. It
15 concluded the prosecutor clearly had been negligent in failing to produce the
16 information in the Weil report in a timely manner, but also found the
17 prosecutor had not intentionally kept the Weil report secret until after the jury
18 returned the verdicts.

19 Defendant contends the court was unreasonable in concluding that the
20 untimely disclosure was not intentional because there were several motions
21 filed and hearings held regarding Jimenez's statements after the time in which
22 the prosecutor became aware of the statements. Defendant claims the
23 prosecutor could not have believed defense counsel was already aware of
24 Jimenez's statements to Weil. Defendant contends it was inconceivable that
25 defense counsel would not have mentioned a "recantation" by Jimenez
26 because such a recantation would have rendered the *Aranda/Bruton* hearings
27 on Jimenez's testimony unnecessary.^{FN37}

28 FN37. Defendant also claims that the prosecutor must
surely have also been aware of the Los Angeles Grand Jury
investigation concerning jail house informants, which had
surfaced with much publicity not long before this trial, and that,
consequently, the prosecutor should have been on notice that the
testimony of a jailhouse informant like Jimenez was likely false.
This argument is based on facts not contained in the record. But
even assuming the prosecutor was aware of the grand jury
investigation, this would add little to defendant's main argument,
which is that the prosecutor had *actual knowledge* of the

unreliability of Jimenez because the prosecutor knew that Jimenez had admitted it to Weil in September of 1993.

The record does not support defendant's claim. It appears the trial court's conclusion was consistent with the prosecutor's statement that when the prosecutor heard Weil's account of Weil's conversation with Jimenez in September of 1993, he understood Jimenez's comments to Weil to be an attempt to get out of testifying because he was unwilling or scared to testify. The prosecutor stated that it was not until after he read the version of the conversation in Weil's March 1994 report, that he was aware of Jimenez's comments that his prior statement to police might be misleading or contain falsehoods due to the drugs he was taking at that time. The prosecutor's understanding of Jimenez's comments to Weil as an attempt to get out of testifying, rather than as a "recantation," is consistent with the prosecutor's apparent lack of surprise that Jimenez's comments to Weil were not mentioned during the *Aranda/Bruton* hearings addressing Jimenez's statements.

Hoyos, 41 Cal. 4th at 916-25 (brackets in original).

A. Brady contention

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. 83, 87 (1963). “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985).

Petitioner asserts that the California Supreme Court’s decision to reject this claim was based on an unreasonable determination of the facts under section 2254(d)(2), arguing that “[w]hile the Supreme Court contends that petitioner established only a ‘possible’ relationship between the Weil report and his decision not to testify, the record demonstrates that both defense counsel were unequivocal that they had decided at the time of the trial that neither defendant would testify at trial, because of Alvarado’s direct vulnerability to impeachment by the Jimenez statements; and were equally unequivocal that both

1 defendants would have testified at the trial if the Weil report had been timely disclosed,
2 because the fear of impeachment would have been neutralized. The record could not be
3 clearer, and the Supreme Court was unreasonable in not recognizing that.” (SAP at 68)
4 (emphasis in original.)

5 First, it is evident that the California Supreme Court was careful to clarify that any
6 conclusions about the impact of the joint defense agreement did not compel its rejection of
7 his Brady claim, noting that: “In observing that defendant has not shown the legal necessity
8 of the purported joint defense strategy, we do not hold defendant is required to show legal
9 necessity in order to establish his *Brady* claim.” Hoyos, 41 Cal. 4th at 921. Instead, it is
10 clear from the California Supreme Court’s own words that the state court decision was
11 based on Petitioner’s failure to demonstrate materiality. At the outset of the discussion,
12 the California Supreme Court remarked that Petitioner failed to even allege or argue
13 materiality with respect to the outcome of the proceedings, as Brady requires, and noted
14 that Petitioner in fact “essentially ignores the issue of how his testimony would have
15 changed the verdict.” Hoyos, 41 Cal. 4th at 918. The state supreme court concluded that
16 Petitioner failed to even show the statement was material to his *decision to testify*, much
17 less demonstrate a connection between the statement and the *outcome of the trial
proceedings*,¹⁴ as required to sustain a Brady claim:

19
20
21
22 ¹⁴ While Petitioner submitted two declarations to the state supreme court in support
23 of his first state habeas petition (see Lodgment No. 115, Ex. 84A; Lodgment No. 117, Ex.
24 115), in neither does he address his desire to testify at trial or the substance of his
25 prospective testimony. During the sentencing proceedings, Petitioner stated that he wanted
26 to testify but that his attorney convinced him not to, and that “[m]y attorney argued
27 something different than what I had told him,” but again, did not address the substance of
28 his prospective testimony. (RT 4953, 4954-58.) In the Reply brief, with respect to Claim
22, Petitioner now specifies that at the outset of the case, he told trial counsel that “he and
Alvarado arrived at the Magoon residence to find the bloody scene and the victims, after
which they left with marijuana from the garage.” (Reply at 97.) However, there is an
absence of record or other documentary support for this contention.

1 Defendant has shown only the *possibility* that his decision not to testify was a
2 result of strategic considerations made in connection with Jimenez's
3 statements. In other words, defendant has shown only the *possibility* that he
4 would have testified had the Weil report been timely produced. To establish
5 materiality under *Brady*, defendant must do more than establish a *possible*
6 relationship between the Weil report and a different result; he must establish
7 a *reasonable probability* of a different result. "The mere possibility that an
8 item of undisclosed information might have helped the defense, or might have
9 affected the outcome of the trial, does not establish 'materiality' in the
10 constitutional sense." (*United States v. Agurs, supra*, 427 U.S. at pp. 109–110,
11 96 S.Ct. 2392.) Ultimately, defendant's contention that the timely disclosure
12 of the Weil report would have resulted in his testifying is based on speculation
13 and fails to establish materiality under *Brady*. (*Brady, supra*, 373 U.S. at p.
14 87, 83 S.Ct. 1194; *Wood v. Bartholomew, supra*, 516 U.S. at p. 6, 116 S.Ct.
15 7.)

16

17 In response to the Court's post-oral argument request for any citations to the record
18 concerning Petitioner's prospective trial testimony (see ECF No. 120), Petitioner filed a
19 response stating that "[t]he state habeas investigation and interviews with Petitioner Hoyos
20 revealed that Petitioner had no involvement in the killings of Mary and Daniel Magoons.
21 Counsel, while aware of Petitioner's statement that when he arrived at the Magoons
22 residence, Mary and Daniel Magoons were dead, did not file an offer of proof as to
23 petitioner's anticipated testimony in the course of the state habeas proceedings in the
24 California Supreme Court. Petitioner consistently maintained that he did not kill the
25 Magoons and that he wanted to testify at trial." (ECF No. 135.) Petitioner also attached
26 the declaration of state habeas counsel, dated April 21, 2017. (ECF No. 135-1.) Respondent asserts that this submission "is non-responsive to the request for citations to
27 the record" and the Court cannot consider declaration of state habeas counsel in reviewing
28 this claim, noting that "[t]he United States Supreme Court has clarified 'that review under
§ 2254(d)(1) is limited to the record that was before the state court that adjudicated the
claim on the merits.'" (ECF No. 141 at 5, quoting Pinholster, 563 U.S. at 181.)

Given the dictates of Pinholster, as well as the fact that this declaration was executed in 2017 and this claim was raised on *direct appeal* rather than *state habeas* and denied in a reasoned decision in 2007, the Court agrees that it cannot consider the declaration of state habeas counsel in reviewing this claim under section 2254(d)(1). See Pinholster, 563 U.S. at 185 ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.")

1 Hoyos, 41 Cal. 4th at 922.

2 A review of the record does not compel a conclusion that the state supreme court's
3 decision was based on an unreasonable determination of the facts. At a post-trial hearing
4 concerning the late disclosure of the Weil report, defense counsel stated that Petitioner had
5 been "adamant about testifying in court," that at the last minute, counsel "talked him out
6 of it," and that Petitioner "made up his mind in court here that morning of the defense case,
7 changed his mind and said he wouldn't testify." (RT 4544.) At the same time, trial counsel
8 acknowledged that the prospect of Jimenez impeaching Alvarado was not the sole
9 consideration given that there were multiple informants, stating that: "The reason why I'm
10 bringing this up is because the reasons that I was talking him out of testifying was because
11 obviously the impeachment of, of him through statements by the jail house informants."
12 (RT 4544-45.) Counsel also conceded that the Weil report only "possibly" would have
13 changed the calculus, and stated that had they known of Jimenez's recantation, "possibly
14 Mr. Alvarado would have testified, and Mr. Hoyos would have testified." (RT 4545.)
15 While counsel noted that Flores' informant statement may not have impacted their strategy
16 "because in a lot of that statement there is a lot of exculpatory stuff," counsel continued to
17 equivocate on the impact of the Jimenez recantation, again stating that with an earlier
18 disclosure of the Jimenez statement "we would have probably counseled them differently
19 because the worst part of the impeachment comes from Jiminez [sic]." (RT 4546-47)
20 (emphasis added.) Counsel reiterated that Petitioner had been "adamant about testifying"
21 and that "[i]t was based on advice of counsel concerning impeachment is the reason why
22 he changed his mind." (RT 4547.) Counsel acknowledged the difficulty of re-evaluating
23 the strategic decisions they would have made in hindsight, as follows: "It's by every logical
24 evidentiary perspective reasonable to think that both wouldn't testify, as in fact has
25 happened, or that both might have testified. Who knows exactly if they would have. It's
26 hard to go back in time, re-live that, make those retroactive strategic decisions, but they
27 very well might have." (RT 4549.)

28 ///

1 Even as the record reflects that Petitioner himself expressed a strong desire to testify
2 and that his ultimate decision not to testify was undoubtedly influenced, at least in part, by
3 the prospect of Jimenez’s testimony, trial counsel acknowledged there were other factors
4 at play, including the prospect of impeachment by Flores. Here, the record supports the
5 reasonableness of the state supreme court’s factual determination, as even trial counsel
6 themselves repeatedly conceded that, given knowledge of the recantation, “possibly” the
7 defendants would have testified and that counsel “probably would have counseled them
8 differently.” Thus, contrary to Petitioner’s assertion, the record reflects that defense
9 counsel was not “unequivocal” that both defendants would have testified had the Weil
10 report been disclosed earlier, and the California Supreme Court was not unreasonable in
11 concluding that Petitioner failed to show more than a “possible” relationship between the
12 Weil report and his decision not to testify. Given the record support for the California
13 Supreme Court’s determination, Petitioner fails to demonstrate that the state court decision
14 involved an unreasonable determination of the facts under section 2254(d)(2).

15 Petitioner similarly fails to satisfy section 2254(d)(1). It is apparent from a review
16 of the record that Petitioner’s argument about materiality is directed to the impact of the
17 Jimenez statement on his decision to testify, rather than on the outcome of the trial. Again,
18 the Supreme Court has held that “evidence is material only if there is a reasonable
19 probability that, had the evidence been disclosed to the defense, the result of the proceeding
20 would have been different.” Bagley, 473 U.S. at 682. In this case, the California Supreme
21 Court correctly and reasonably noted that while Petitioner argued that the Weil report was
22 material to his decision not to testify, Petitioner “essentially ignores the issue of how his
23 testimony would have changed the verdict.” Hoyos, 41 Cal. 4th at 918. Because Petitioner
24 failed to argue, much less demonstrate, that the Weil report was material to the outcome of
25 Petitioner’s trial proceedings, he did not establish that Brady error occurred in his case. As
26 such, the California Supreme Court’s rejection of this contention was neither contrary to,
27 nor an unreasonable application of, clearly established federal law.

28 ///

B. Ineffective Assistance of Counsel and Right to Testify

Petitioner contends that in addition to the Brady violation, “defense counsel were also deficient in their efforts to affirmatively investigate and impeach informant Jimenez particularly and informant Lopez¹⁵ as well.” (SAP at 69.)

In the Answer, Respondent contends that this aspect of Claim 13 is not exhausted. (Ans. Mem. at 61.) On direct appeal, the California Supreme Court addressed Petitioner’s claim that the untimely disclosure of the Weil report “violated his right to receive meaningful guidance from his counsel on whether or not to testify on his own behalf.” Hoyos, 41 Cal. 4th at 922. In doing so, the California Supreme Court noted that: “Defendant does not argue that his trial counsel was deficient because he failed to uncover the Jimenez impeachment evidence.” Hoyos, 41 Cal. 4th at 922-23. Petitioner appears to now offer that very argument. Thus, to the extent Petitioner asserts trial counsel was ineffective for failing to investigate possible impeachment evidence concerning Jimenez, the contention appears unexhausted.

Petitioner maintains that Respondent waived exhaustion by failing to raise it in an earlier motion to dismiss for failure to exhaust. (Pet. Brief at 24-25.) Pursuant to AEDPA: “A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.” 28 U.S.C. § 2254(b)(3). Moreover, the Ninth Circuit has indicated that

¹⁵ The Court's review of the record reveals the existence of two informants, Jimenez and Flores, neither of whom ended up testifying at trial. See e.g. Hoyos, 41 Cal. 4th at 894. One witness at trial, an acquaintance of Petitioner's, was named Marbell or Maria Lopez, while James Johnson testified that he thought Petitioner and Lopez were married and that Petitioner's name was Jaime Lopez. See id. at 886-87, 887 fn. 6. The failure to identify an informant named Lopez does not appear to impact the Court's consideration of this claim, as the substance of Petitioner's argument centers on counsel's alleged failure to obtain the same Jimenez impeachment evidence at issue in the Brady claim. Petitioner offers no details about the identity of an informant named Lopez nor does Petitioner provide any specific allegations about counsel's purported deficiencies in investigating impeachment information concerning any informant named Lopez.

1 under the Federal Rules of Civil Procedure 7(a), 8(c), and 12(b), a motion or stipulation
2 may not constitute a “responsive pleading” sufficient to waive an affirmative procedural
3 defense such as exhaustion. See Randle v. Crawford, 604 F.3d 1047, 1053 (9th Cir. 2010)
4 (rejecting contention that the State waived a procedural defense by failing to raise it in a
5 prior motion to dismiss, stipulation to stay proceedings, or opposition to motion to reopen
6 federal case.)

7 Ultimately, the Court need not resolve the exhaustion status of this contention
8 because the claim is without merit; the Court may exercise discretion to deny a claim on
9 the merits despite a petitioner’s failure to fully exhaust state judicial remedies. See 28
10 U.S.C. § 2254(b)(2); Gatlin v. Madding, 189 F.3d 882, 889 (9th Cir. 1999).

11 In this instance, Petitioner cannot establish that trial counsel’s performance fell
12 below constitutional guarantees. As the trial court and the state supreme court each
13 appropriately recognized, even had Petitioner chosen to testify, the prosecutor could not
14 have called Jimenez to testify against him. (See RT 4729-30) (“There isn’t any Sixth
15 Amendment violation that I see as to Mr. Hoyos in this case. He could have testified in
16 this case without any fear of impeachment by Jiminez [sic]. He chose not to do so. In fact,
17 he chose not to do so in advance for reasons, as it seems, to be more akin to familial
18 considerations. We sink or swim together, this sort of approach. That’s not cognizable as
19 a constitutional violation. He made a decision and the potential impeaching information
20 of the informant as to his co-defendant is not really of constitutional significance as to Mr.
21 Hoyos.”); see also Hoyos, 41 Cal. 4th at 920 (“As defendant concedes, Jimenez’s
22 statements were admissible only as impeachment evidence against Alvarado, if Alvarado
23 testified. For defendant, unlike Alvarado, there was no direct causal connection between
24 Jimenez’s statements and the decision whether or not to testify. If Alvarado testified,
25 Jimenez’s statements could have impeached him. But the prosecution could not have
26 impeached defendant with Jimenez’s statements, even if Jimenez testified.”) Only if
27 Alvarado chose to testify could Jimenez have been called as an impeachment witness. As
28 such, Petitioner fails to persuasively explain why counsel had a duty to independently

1 investigate potential impeachment evidence concerning an individual that could not have
2 been called to testify as a witness against him, much less demonstrate that the failure to do
3 so “fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 687-88.

4 Even if Petitioner were able to show that trial counsel was somehow deficient for
5 failing to independently investigate and possibly obtain evidence impeaching a potential
6 witness against his co-defendant, his claim of ineffective assistance nonetheless fails
7 because he cannot demonstrate prejudice. Petitioner has not shown how his testimony
8 would have made a difference to the outcome of the trial, much less demonstrate “there is
9 a reasonable probability that, but for counsel’s unprofessional errors, the result of the
10 proceeding would have been different.” Id. at 694. At the time of the defense motion for
11 a new trial, Petitioner told the trial court that he “wanted to take the stand and testify” but
12 that he did not do so because counsel told him not to testify. (RT 4954-55.) Again,
13 Petitioner submitted two separate declarations in support of his state habeas petition, but
14 in neither does Petitioner even state that he wanted to testify at trial, much less provide any
15 indication about what he would have testified to at trial. (See Lodgment No. 115, Ex. 84A;
16 Lodgment No. 117, Ex. 115.) In any event, this claim was raised and adjudicated by the
17 California Supreme Court on *direct appeal*, and Petitioner fails to point to evidence in the
18 record before the state court at the time of that decision which supports his contention.
19 (See fn. 14, supra; see also Pinholster, 563 U.S. at 181, 185.) In the absence of any attempt
20 to show, much less actual evidence demonstrating, that Petitioner’s testimony would have
21 made a difference in the jury’s verdict, the Court cannot conclude that Petitioner was
22 prejudiced by trial counsel’s alleged deficiencies. See Richter, 562 U.S. at 112 (“The
23 likelihood of a different result must be substantial, not just conceivable.”) Therefore, even
24 were Petitioner able to establish that counsel’s performance was constitutionally
25 inadequate, the claim fails for lack of prejudice. See Strickland, 466 U.S. at 697 (“If it is
26 easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,
27 which we expect will often be so, that course should be followed.”) The California
28 Supreme Court’s rejection of this contention was neither contrary to, nor an unreasonable

1 application of, Strickland.

2 **C. Prosecutorial Misconduct and Right to Testify**

3 Finally, Petitioner asserts that his “right to testify on his own behalf, which is a
4 personal and fundamental constitutional right, was violated in this case as a result of
5 prosecutorial misconduct on the Brady front and ineffective assistance of counsel regarding
6 both impeachment evidence of prosecution witnesses and the affirmative development of
7 defense evidence.” (SAP at 70.)

8 To sustain a claim of prosecutorial misconduct on federal habeas review, a petitioner
9 must demonstrate that the misconduct at issue “so infected the trial with unfairness as to
10 make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S.
11 168, 181 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Alleged
12 instances of misconduct must be reviewed “in the context of the entire trial.” Donnelly,
13 416 U.S. at 639; see also Greer v. Miller, 483 U.S. 756, 765-66 (1987), citing Darden, 477
14 U.S. at 179 and Donnelly, 416 U.S. at 639. This is because “the touchstone of due process
15 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the
16 culpability of the prosecutor.” Smith v. Phillips, 455 U.S. 209, 219 (1982). Habeas relief
17 is warranted only if the error “had substantial and injurious effect or influence in
18 determining the jury’s verdict.” Brecht, 507 U.S. at 637.

19 On the showing offered by Petitioner, the Court is unable to conclude that the
20 prosecution’s failure to turn over the Jimenez material in a timely manner, even assuming
21 it constituted misconduct, “so infected” his trial as to deprive him of due process. As
22 discussed above, despite Petitioner’s lengthy and detailed arguments to the contrary, he
23 was not directly impacted by the Jimenez impeachment materials, which could not have
24 been used against him had he chosen to testify at trial. Moreover, for the reasons discussed
25 above in the discussion of the Brady and ineffective assistance of counsel contentions, even
26 if Petitioner could establish the existence of constitutional error, he fails to show that the
27 error had any impact on the outcome of his trial proceedings, much less a “substantial and
28 injurious effect or influence” on the verdict. Brecht, 507 U.S. at 637.

1 Because Petitioner fails to demonstrate that the California Supreme Court's rejection
2 of Claim 13 was contrary to, or an unreasonable application of, clearly established federal
3 law, or that it was based on an unreasonable determination of the facts, he is not entitled to
4 habeas relief. An evidentiary hearing is not warranted on Claim 13. See Sully, 725 F.3d
5 at 1075 ("[A]n evidentiary hearing is pointless once the district court has determined that
6 § 2254(d) precludes habeas relief.")

7 2. **Claim 14**

8 Petitioner asserts that: (1) the prosecution's failure to provide information about a
9 third party that was potentially responsible for the murders violated Brady and Petitioner's
10 right to due process, (2) defense counsels' failure to independently investigate and develop
11 a third party culpability defense deprived him of the effective assistance of counsel, and
12 (3) the combination of these violations infringed on his right to testify. (SAP at 70-81.)
13 Petitioner requests an evidentiary hearing on this claim. (Id. at 55.)

14 This claim, aside from the allegations of ineffective assistance of counsel at trial and
15 on appeal, were raised in the first state habeas petition and summarily denied on the merits
16 by the California Supreme Court. (See Lodgment Nos. 106, 118.) The aspect of this claim
17 alleging ineffective assistance of counsel was raised in the second state habeas petition,
18 which the California Supreme Court rejected on the merits in addition to holding it was
19 procedurally barred. (See Lodgment Nos. 120, 124.) For the reasons discussed above in
20 section III.A., the Court will reach the merits of this claim.

21 A. **Brady**

22 As stated above in the discussion of Claim 13, in Brady, the Supreme Court held that
23 "suppression by the prosecution of evidence favorable to an accused upon request violates
24 due process where the evidence is material either to guilt or to punishment, irrespective of
25 the good faith or bad faith of the prosecution." Id., 373 U.S. at 87. "There are three
26 components of a true Brady violation: The evidence at issue must be favorable to the
27 accused, either because it is exculpatory, or because it is impeaching; that evidence must
28 have been suppressed by the State, either willfully or inadvertently; and prejudice must

1 have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

2 Under Brady, “the individual prosecutor has a duty to learn of any favorable
3 evidence known to the others acting on the government’s behalf in the case, including the
4 police.” Kyles v. Whitley, 514 U.S. 419, 437 (1995). Yet, “the prosecutor is not required
5 to deliver his entire file to defense counsel, but only to disclose evidence favorable to the
6 accused that, if suppressed, would deprive the defendant of a fair trial.” Bagley, 473 U.S.
7 at 675 (footnote omitted). “Under Brady’s suppression prong, if ‘the defendant is aware
8 of the essential facts enabling him to take advantage of any exculpatory evidence,’ the
9 government’s failure to bring the evidence to the direct attention of the defense does not
10 constitute ‘suppression.’” Cunningham v. Wong, 704 F.3d 1143, 1154 (9th Cir. 2013),
11 quoting Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006).

12 During the investigation of the murders, several reports were turned over to the
13 defense concerning an individual named David Luna. Investigator Oliver’s May 18, 1993,
14 report stated that in a January 25, 1993, conversation, James Johnson told investigators
15 Weil and Oliver that: “David Luna’s brother, Chris, told him the Magoon’s [sic] were killed
16 at the direction of David.” (Lodgment No. 109, Ex. 32.) Oliver’s report also stated that
17 “[a]ttempts to identify David and Chris Luna based on the information provided by Mr.
18 Johnson were subsequently made by Detective Weil and I with negative results.” (Id.)

19 Investigator Weil completed a report of this same interview of James Johnson, dated
20 June 24, 1993, which was also turned over to the defense. In the report, Weil stated that:
21 “During the course of the interview with Mr. Johnson, he related that it came to his attention
22 from an unnamed source that the murders of Daniel and May [sic] Magoon were planned
23 by members of the Luna family. Johnson would not name his source but said that the
24 source identified the brothers David and Chris Luna as being involved in the murders.
25 Johnson went on to say that his source informed him that Chris Luna was currently in the
26 Metropolitan Correction Center in downtown San Diego on some unrelated drug charges.
27 Johnson went on to say that his source stated that during the time that the Magoons were
28 murdered, the Luna brothers were living in the Jamul area of San Diego county. Johnson

1 said his source did not know any other information other than what [sic] he had just told
2 us about the Lunas and their possible whereabouts.” (Id., Ex. 33 at 1.) Weil’s report further
3 stated that he and Oliver unsuccessfully attempted to identify David and Chris Luna
4 “through federal, state and local computer inquiries,” similarly failed to locate Chris Luna
5 at the MCC in San Diego, and that “[n]o Christopher or David Luna being brothers could
6 be identified, and no dates of birth were discovered.” (Id.) Both parties agree that these
7 documents were turned over to defense counsel, and that the defense was aware that James
8 Johnson had named David Luna as an individual that may have been involved in the
9 commission of the Magoon murders. (SAP at 70-71, Ans. Mem. at 72.) A discovery
10 receipt reflects that the Weil and Oliver reports were turned over to the defense in July
11 1993. (Lodgment No. 109, Ex. 33 at 2.)

12 However, in February 1993 the prosecution also obtained David Luna’s identifying
13 details, which were not disclosed, including Luna’s fingerprints, date of birth, social
14 security number, and information about prior arrests. (Id., Exs. 34, 35.) Petitioner argues
15 that the information was material and that the failure to disclose these details about Luna
16 violated Brady, as follows: “These documents were never turned over to the defense,
17 notwithstanding the fact that they contained identifying information that would have made
18 it significantly easier for defense counsel to locate David Luna, as well as additional
19 information regarding his history of violence to use in building a third party culpability
20 defense.” (Reply at 72) (emphasis in original). Petitioner asserts that “[t]he undisclosed
21 information confirmed that David Luna was a real person with a specific physical
22 description and a history of arrests for violent assaultive conduct that made him a very
23 strong contender as the actual third party perpetrator of the Magoon murders.” (Pet. Brief
24 at 29.)

25 The California Supreme Court’s rejection of Petitioner’s Brady claim was
26 reasonable because Petitioner fails to demonstrate that David Luna’s identifying
27 information was itself either exculpatory or material. In United States v. Agurs, 427 U.S.
28 97 (1976), the Supreme Court clearly stated that “there is ‘no constitutional requirement

1 that the prosecution make a complete and detailed accounting to the defense of all police
2 investigatory work on a case,”” and held that “[t]he mere possibility that an item of
3 undisclosed information might have helped the defense, or might have affected the
4 outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” Id., 427
5 U.S. at 109-11 (footnote omitted), quoting Moore v. Illinois, 408 U.S. 786, 795 (1972).
6 Here, Petitioner was apprised of the favorable evidence in this case, that a man named
7 David Luna, who lived in the Jamul area and had a brother in jail named Chris, may have
8 ordered the Magoon murders. Defense investigator Paul Pickering acknowledged that the
9 defense was aware of the reports about Johnson and Luna, and Pickering stated that he
10 asked several witnesses about David Luna. (Lodgment No. 107, Ex. 8 at 3-4.) The
11 prosecution provided the defense with the “essential facts,” including Luna’s name, general
12 location, and possible involvement, that would allow the defense to pursue a third party
13 culpability defense. See Cunningham, 704 F.3d at 1154, quoting Raley, 470 F.3d at 804.
14 That Luna’s date of birth and other information may have made it easier to locate him does
15 not suffice to state a Brady violation. The California Supreme Court could have reasonably
16 rejected this claim for failure to establish a Brady violation on this basis.

17 Additionally, as discussed in detail below with respect to Petitioner’s related claim
18 of ineffective assistance of counsel, even were Petitioner able to show that the
19 prosecution’s failure to turn over this information amounted to a Brady violation, the
20 California Supreme Court could also have reasonably denied the claim for failure to
21 demonstrate prejudice.

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B. Ineffective Assistance of Counsel

Petitioner separately contends trial counsel was ineffective for failing to conduct an adequate investigation of the third party culpability defense and for failing to present the defense at trial. (SAP at 72-80.) He also asserts that state appellate counsel was ineffective for failing to raise this claim in the first state habeas petition.¹⁶ (*Id.*)

As noted above, “a defendant must show both deficient performance and prejudice in order to prove that he has received ineffective assistance of counsel.” Mirzayance, 556 U.S. at 122, citing Strickland, 466 U.S. at 687.

Pursuant to Strickland, “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Id. at 691. With respect to performance, Petitioner asserts that “trial counsel was put on notice of a third party culpability defense, but made initial and ineffectual efforts to pursue it, as documented in the declarations of investigator Paul Pickering and case manager Bunny Amendola.” (Pet. Brief at 33-34.) Yet the record reflects that defense counsel made numerous efforts, unsuccessful as they were, to investigate alternate suspects and theories

¹⁶ Petitioner appears to raise this contention as both an independent claim of ineffective assistance of counsel and as cause to excuse the procedural default of his ineffective assistance of trial counsel claim, as he asserts that he “is entitled to a ruling on the merits of this IAC claim as well as a ruling on the merits of the IAC claim as to trial counsel.” (SAP at 80.) For reasons discussed previously in this Order, the Court will reach the merits of the ineffective assistance of trial counsel claim regardless of the California Supreme Court’s imposition of state procedural bars.

With respect to Petitioner’s independent claim of ineffective assistance of state habeas counsel, such an argument fails to find support in clearly established law. Coleman, 501 U.S. at 752 (“There is no constitutional right to an attorney in state post-conviction proceedings.”), citing Pennsylvania v. Finley, 481 U.S. 551 (1987) and Murray v. Giarratano, 492 U.S. 1 (1989). “Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” Coleman, 501 U.S. at 752, citing Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam); see also 28 U.S.C. § 2254(i) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”)

1 of the crime. Pickering states that after reading the reports about Johnson and Luna, he
2 “thought there was a good chance Johnson was telling the truth,” but while Pickering asked
3 several witnesses about David Luna, “they claimed they didn’t know the name; we didn’t
4 have anything but a name to go on.” (Lodgment No. 107, Ex. 8 at 3.) Amendola states
5 that the defense “believed Dan Magoon was running drugs with Conrado Mejia” and that
6 they “were hoping to find another organization that wanted Magoon dead.” (Lodgment
7 No. 110, Ex. 48 at 2.) Amendola mentions that the defense obtained the names of several
8 individuals with the Arellano Felix cartel through the federal case against Mejia, but “we
9 had nothing else that was really substantial.” (Id.) In a 2011 declaration submitted in
10 support of the second state habeas petition, Pickering states that “[w]e followed every lead
11 which turned up during our investigation, including, trying to identify third parties who
12 had motive to harm the Magoons. There was never a tactical decision made by the defense
13 team to abandon the investigation into third party culpability in the killings of the
14 Magoons.” (Lodgment No. 123, Ex. 9 at 2.) In a 2011 declaration in support of the second
15 state petition, Amendola similarly states that “[w]e followed every lead, including trying
16 to identify the many third parties who had motive to harm the Magoons. The trial team
17 entertained every possible defense theory, particularly the notion that some third party was
18 guilty of killing the Magoons. In my mind, the case was always a ‘who done it’ type of
19 case. I remain convinced to this day that other, third parties were involved in the Magoons
20 killings. To my knowledge, there was never a tactical decision made by the defense team
21 to abandon the investigation into third party culpability in the killings of the Magoons.”
22 (Id., Ex. 10 at 2.)

23 Petitioner contends that much more information has since been unearthed and could
24 have been presented had the trial defense team properly investigated a third party theory of
25 the murders. Kevin Gordon, an investigator who worked with Petitioner’s state habeas
26 attorneys, outlines his conversations with James Johnson, who declined to provide a
27 declaration in support of those proceedings. (Lodgment No. 109, Ex. 36 at 1.) Gordon
28 relates that Johnson and Daniel Magoon smuggled drugs in the 1970’s and 1980’s with a

1 man they called Conrad or the “Old Man,” left the work for a time and then returned in
2 early 1990’s when both needed money. (Id.) Gordon states that: “Conrad agreed to work
3 with them again and put them in touch with a relative in the Jamul/Spring Valley area who
4 was basically doing what they had been doing before - providing safe transport for
5 Conrad’s drugs after they crossed the border to places further north.” (Id.) Johnson also
6 told him that: “A few months before the crime, Dan also started dealing with several
7 Mexicans named Jaime, Oscar, Armando, and Gabrielle. They had nothing to do with
8 Conrad.” (Id.) Johnson stated that Daniel Magoon sold these individuals weapons in
9 exchange for money and marijuana, and that at some point, these individuals started to owe
10 Daniel money which Daniel went to lengths to collect, including going to Mexico. (Id. at
11 2.) Johnson told Gordon that: “The days before the murder, he and Dan were preparing to
12 move a load for Conrad,” that “[t]he marijuana was going to be brought across the border
13 in a car” and that Johnson was expected to monitor a police scanner and follow the car to
14 a safe house where “he and Dan would then move the drugs to another car with a special
15 compartment and then move that car north towards Los Angeles.” (Id.) On the evening
16 prior to the expected activity, Daniel Magoon seemed nervous about the run and did some
17 cocaine at Johnson’s home, and then “Dan had to go home to meet this relative of Conrad
18 who was dropping off the car that they would use to move the load north,” who always
19 came by around 10 or 11 p.m. (Id. at 3.)

20 Johnson also reiterated and elaborated on the information concerning David Luna as
21 a potential suspect. After the murders, Johnson stated that: “A friend of his called him up
22 and said there might be someone that he should talk to. He met with this other person who
23 told him that Dan and Mary’s murders were a hit ordered by David Luna.” (Id.) Johnson
24 told Gordon he obtained this information from a person who knew someone who had been
25 in the MCC jail with David’s brother Chris, and that “[t]he person in jail who heard this
26 information passed it along to relatives so they would know to stay away from David
27 Luna.” (Id.) According to Johnson, “David Luna was the relative of Conrad who he
28 (Johnson) and Dan had been working with for the last few months,” and Luna lived on a

1 ranch just a few miles from Steele Canyon Road, the road the Magoon home was located
2 on. (Id.) Johnson told Gordon that “Dan had trusted Luna because Luna was somehow
3 related to Conrad.” (Id. at 3-4.) Johnson also stated that in the weeks or months before the
4 murders, Daniel asked Luna for help with the Mexicans that owed him money and “asked
5 Luna to go down to Ensenada and pressure these guys to pay up what they owed.” (Id. at
6 4.) Johnson added that: “He was also the person who was supposed to bring by the
7 transport car the night of the crime. The day after the murder, he (Johnson) drove to the
8 Luna residence to inform him what had happened but was told by Luna’s father that Luna
9 had left town for several days.” (Id.) Based on the name David Luna and fingerprint
10 records, Gordon located the 1992 home address of a man named David Luna, which was
11 located in the area described by Johnson. (Id.)

12 Federal habeas investigator Apolinar Echeverria, who previously worked in various
13 capacities in law enforcement and investigation for both the prosecution and defense for
14 the past thirty years, states that had he worked on this case, he would have actively
15 investigated David Luna, Conrad Mejia and other drug and weapons traffickers in the
16 Jamul and Tecate areas. (Lodgment No. 120, Ex. 6 at 1-4.) Echeverria also states that co-
17 defendant Alvarado’s investigator “previously worked for, or associated with” individuals
18 involved in trafficking and that that investigator’s brother “was actively working for the
19 cartel at the time of the killings.” (Id. at 4.) Echeverria states that “[i]t was well known in
20 1992 that the Alvarado family were very active smugglers in the Tecate area,” that the
21 family remains involved in trafficking and their “reputation for violence is well known in
22 that area.” (Id. at 4-5.) Echeverria states that Oscar Tirado, whose identification was found
23 in a vehicle on the Magoon property, and Gabriel Villavicencio, among others, “were
24 known drug traffickers,” were tied to Daniel Magoon and were seen on the Magoon
25 property during the month prior to the murders. (Id. at 5.) Echeverria also detailed the
26 smuggling activities and violence employed by individuals involved in the Tijuana Cartel
27 around this time and states that Efrain Perez, who was “responsible for organizing the
28 receipt and importation into the United States of the Tijuana Cartel’s shipments of illegal

1 drugs, including marijuana," was, along with other individuals involved in these activities
2 "seen at the Magoon residence on several occasions in the week prior to the killings on
3 May 26, 1992. The Tijuana Cartel and its associates should have been investigated in
4 connection with the Magoon killings." (Id. at 5-6.) Echeverria also states that: "I have
5 learned that just prior to the Magoon killings, the Magoons lost a large load of marijuana
6 either while in transit or in the State of Washington. Due to the temporal proximity of the
7 loss of this load and the known propensity for violence of drug trafficking organizations
8 likely responsible for the marijuana, this lead should have been actively followed up." (Id.
9 at 7.)

10 Again, it is apparent from the record that the defense possessed Johnson's initial
11 statement pointing to David Luna as a possible suspect in the murders and conducted
12 inquiry into that information. Defense investigator Pickering recalled asking witnesses
13 about Luna, but failed to obtain information on him. Similarly, defense counsel Herrera
14 states that "Pickering wanted to develop the larger picture, & explore connections with
15 *narcotraficantes* who might have had problems with Daniel Magoon. We allowed him to
16 investigate this issue, while reminding him to be careful, and not let himself get killed."
17 (Lodgment No. 110, Ex. 44 at 5) (emphasis in original.) Herrera states that his co-counsel
18 "became frustrated at what he thought was a 'fishing expedition,' and delegated that line
19 of investigation to me." (Id. at 5.) Herrera states that Pickering "came up with suggestive
20 leads, but nothing sufficiently concrete to present as evidence." (Id. at 6.) The record also
21 reflects that the defense was aware of Oscar Tirado's connection to the case, as the defense
22 subpoenaed Tirado as a potential trial witness and later decided against calling him to
23 testify. (RT 3668.) Thus, at a minimum, it is evident that the defense conducted an
24 investigation into potential alternate suspects. Herrera's statement that the investigation
25 resulted in "nothing sufficiently concrete to present as evidence," reflects a considered
26 choice, and is entitled to at least some deference. See Strickland, 466 U.S. at 690-91
27 ("[S]trategic choices made after less than complete investigation are reasonable precisely
28 to the extent that reasonable professional judgments support the limitations on

1 investigation.”); Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998) (“[T]he relevant
2 inquiry under Strickland is not what defense counsel could have pursued, but rather
3 whether the choices made by defense counsel were reasonable.”); Richter, 562 U.S. at 105
4 (“When § 2254(d) applies, the question is not whether counsel’s actions were reasonable.
5 The question is whether there is any reasonable argument that counsel satisfied Strickland’s
6 deferential standard.”)

7 Even were the Court to assume, without deciding, that counsel acted deficiently in
8 failing to adequately investigate the third party culpability defense and obtain the
9 information set forth above, the California Supreme Court’s rejection of this claim was not
10 contrary to, nor an unreasonable application of Strickland because the California Supreme
11 Court could have reasonably rejected the claim for lack of prejudice. See Strickland, 466
12 U.S. at 691 (“An error by counsel, even if professionally unreasonable, does not warrant
13 setting aside the judgment of a criminal proceeding if the error had no effect on the
14 judgment.”)

15 With respect to the admission of evidence of third party culpability, the Ninth Circuit
16 has noted that:

17 Under California law, [a defendant] has a right to present evidence of third
18 party culpability if it is capable of raising a reasonable doubt about his own
19 guilt. See People v. Hall, 41 Cal. 3d 826, 833, 226 Cal.Rptr. 112, 116, 718
20 P.2d 99 (1986). In order for evidence of another suspect to be admissible,
however, “there must be direct or circumstantial evidence linking the third
21 person to the actual perpetration of the crime.” Id. Motive or opportunity is
22 not enough.” Id.

23 Spivey v. Rocha, 194 F.3d 971, 978 (9th Cir. 1999). The Ninth Circuit has also stated that
24 “[e]vidence of third party culpability is not admissible ‘if it simply affords a possible
25 ground of suspicion against such person; rather, *it must be coupled with substantial*
26 *evidence tending to directly connect that person with the actual commission of the*
27 *offense.*’” People of Territory of Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993),
28 quoting Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983) (emphasis in original).

1 Petitioner contends that “the declaration of private investigator Apolinar Echeverria
2 summarizes the strong showing as to the likely involvement of David Luna and his drug-
3 smuggling cohorts in the Magoon murders.” (Pet. Brief at 34.) But Petitioner merely
4 shows that David Luna, or other individuals, had a potential motive or opportunity to
5 commit the murders independent of Petitioner, and this showing fails to “directly connect”
6 any of these individuals to the murders. That David Luna owned property in the vicinity
7 of the victims and was likely involved in drug dealing activities with Daniel Magoon offers,
8 at most, that Luna may have had a motive to kill Daniel Magoon. Setting aside the fact
9 that investigator Gordon’s declaration relays second-hand information from his
10 conversations with James Johnson, Johnson’s statements that he and Daniel Magoon
11 worked with Luna and that Luna was expected at the Magoon home on the evening of the
12 murders in the course of their mutual drug smuggling activities demonstrates only that
13 David Luna may have also had the opportunity to commit the murders. Petitioner fails to
14 offer evidence that David Luna was actually at the Magoon home that evening, nor any
15 evidence to substantiate his assertion that Luna committed, ordered, or was at all involved
16 in, the murders. Even were the Court to assume as true that the Magoons were responsible
17 for a missing or stolen drug shipment shortly before the murders, despite Petitioner’s
18 failure to substantiate the basis for this assertion, this does not actually link David Luna to
19 the commission of the murders. Evidence of a missing drug shipment only provides
20 another possible motive, which is still inadmissible unless accompanied by actual evidence
21 connecting Luna to the crimes. See Spivey, 194 F.3d at 978.

22 Indeed, Petitioner’s argument, premised on the unsupported assertion that the
23 murders were motivated by an intercepted or lost drug shipment, is not even limited to
24 David Luna. Petitioner instead posits that missing drugs “would have put the Magoons in
25 deep trouble with the Mexican suppliers of the shipment, triggering a violent response
26 likely engineered by David Luna at the behest of Conrado Mejia, or at the behest of a
27 different cartel whose shipment of contraband was lost on the Magoons’ watch.” (Pet.
28 Brief at 34.) As with the allegations concerning Luna, Petitioner’s assertions are

1 speculative and are not supported by evidence.

2 “The pivotal question is whether the state court’s application of the Strickland
3 standard was unreasonable.” Richter, 562 U.S. at 101. Here, because the evidence
4 Petitioner presents “simply affords a possible ground of suspicion against” David Luna,
5 Conrad Mejia, and other individuals linked to cartel and drug smuggling activities, it is not
6 admissible under California law, given the lack of any evidence connecting those
7 individuals to the murders or the crime scene. Ignacio, 10 F.3d at 615. Counsel cannot be
8 faulted to failing to obtain and attempt to present a third party theory in this manner, as the
9 evidence he advances is not “capable of raising a reasonable doubt about his own guilt.”
10 Spivey, 194 F.3d at 978, quoting Hall, 41 Cal. 3d at 833. Meanwhile, the evidence at trial
11 clearly connected Petitioner and Alvarado to both the crime scene and the murders,
12 including but not limited to Alvarado’s fingerprint at the crime scene, blood evidence, nine
13 millimeter bullets found both at the crime scene and in Alvarado’s car, the Helwan box at
14 the Magoon home, the Helwan pistol found in the car, and the large amount of frozen
15 marijuana in the car’s trunk wrapped with tape containing Daniel Magoon’s fingerprint.

16 Based on a review of the record and the materials proffered by Petitioner in support
17 of a prospective third party culpability defense, the Court is not persuaded that there is “a
18 reasonable probability that, but for counsel’s unprofessional errors” in failing to adequately
19 pursue and present this defense at trial, “the result of the proceeding would have been
20 different.” See Strickland, 466 U.S. at 694, see also Richter, 526 U.S. at 112 (“The
21 likelihood of a different result must be substantial, not just conceivable.”) The California
22 Supreme Court could have reasonably denied this claim for failure to demonstrate
23 prejudice, and the rejection of this claim was neither contrary to, nor involved an
24 unreasonable application of, Strickland.

25 **C. Right to Testify**

26 Petitioner argues that “[t]he combination of prosecutorial suppression of exculpatory
27 evidence regarding third party culpability and defense counsel’s failure to investigate based
28 on what information was available combined to infringe petitioner’s right to testify.” (SAP

1 at 80.) Specifically, Petitioner asserts that “[h]ad defense counsel adequately investigated
2 the third party culpability defense to the effect that the Magoons were killed as part of a
3 falling out between drug traffickers unrelated to petitioner, counsel would likely have
4 agreed to petitioner’s adamant assertions that he wanted to testify that he was not involved
5 in the Magoon murders, which would have been consistent with and corroborated by the
6 third party culpability defense.” (*Id.* at 80-81.)

7 “At this point in the development of our adversary system, it cannot be doubted that
8 a defendant in a criminal case has the right to take the witness stand and to testify in his or
9 her own defense.” Rock, 483 U.S. at 49. Here, however, because both his Brady claim
10 and claim of ineffective assistance of counsel with respect to the third party culpability
11 defense are without merit, Petitioner cannot demonstrate that these alleged errors impacted
12 or infringed his right to testify. That is because the evidence presented in support of the
13 prospective third party culpability defense is not “capable of raising a reasonable doubt
14 about his own guilt.” Spivey, 194 F.3d at 978, quoting Hall, 41 Cal. 3d at 833. As this
15 evidence is not admissible under California law, Petitioner cannot demonstrate a violation
16 of his constitutional rights in this regard.

17 Petitioner fails to show that the California Supreme Court’s rejection of Claim 14
18 was contrary to, or an unreasonable application of, clearly established federal law, or that
19 it was based on an unreasonable determination of the facts. Petitioner is not entitled to an
20 evidentiary hearing on Claim 14. See Sully, 725 F.3d at 1075 (“[A]n evidentiary hearing
21 is pointless once the district court has determined that § 2254(d) precludes habeas relief.”)

22 **3. Claim 15**

23 Petitioner asserts that the prosecutor made a number of misleading statements in
24 opening argument about the blood evidence, which were “substantial exaggerations if not
25 entirely fabrications of what the forensic evidence could actually support,” and defense
26 counsel failed to object to the statements, violating his rights to due process and the
27 effective assistance of counsel. (SAP at 81.) Petitioner requests an evidentiary hearing on
28 this claim. (*Id.* at 55.)

1 Petitioner raised this claim as Claim 5 in the first state habeas petition. (Lodgment
2 No. 106.) The California Supreme Court summarily denied the claim on the merits and
3 alternately held that aside from the allegation of ineffective assistance of counsel, the claim
4 was barred because it could have been but was not raised on appeal, citing to Dixon.
5 (Lodgment No. 118.) For the reasons discussed above in section III.A., the Court will
6 address the merits of this claim.

7 As stated above, to warrant habeas relief, prosecutorial misconduct must have “so
8 infected the trial with unfairness as to make the resulting conviction a denial of due
9 process.” Darden, 477 U.S. at 181, quoting Donnelly, 416 U.S. at 643. “[I]t ‘is not enough
10 that the prosecutors’ remarks were undesirable or even universally condemned.’” Darden,
11 477 U.S. at 181, quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983).
12 Again, this is because “the touchstone of due process analysis in cases of alleged
13 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”
14 Smith, 455 U.S. at 219. Alleged instances of misconduct must be reviewed “in the context
15 of the entire trial.” Donnelly, 416 U.S. at 639; see also Greer, 483 U.S. at 765-66, citing
16 Darden, 477 U.S. at 179 and Donnelly, 416 U.S. at 639. Habeas relief is warranted only if
17 the error “had substantial and injurious effect or influence in determining the jury’s
18 verdict.” Brecht, 507 U.S. at 637.

19 During opening arguments at the guilt phase proceedings, the prosecutor previewed
20 anticipated expert witness testimony about the blood and DNA evidence, in part as follows:

21 There is going to be numerous people to come in to try and help put
22 things together for you. They are called expert witnesses. One of the expert
23 witnesses you are going to hear from is a man by the name of Gary Harmor.
24 Gary Harmor does serology; Gary Harmor tests blood. He does a technique
25 involving what’s called PCR/DNA to determine where blood - - what the
blood source is. And what they do is either include people or exclude people
as being the source of the blood.

26 In this case the pants that Mr. Hoyos was wearing when he was arrested
27 a little over an hour after the killings were examined and the pants had blood
28 on them. Not only did the pants contain the blood of Mr. Hoyos, but they had

1 small what are called high velocity spatters belonging to Mary Magoon and
2 [J.] Magoon. The air rifle that I showed you had some blood removed or some
3 samples removed from the barrel and from the trigger guard. The blood
4 sample from the barrel came back to Mary Magoon, from the trigger guard
5 Mr. Hoyos. There is a Ruger in there. On the trigger guard that has the blood
6 of Mr. Hoyos on it.

7 (RT 2862-63.)

8 First, the record does not support a conclusion that the prosecutor's opening
9 argument contained "substantial exaggerations if not entirely fabrications" about the blood
10 evidence. The expert testimony offered was consistent with the prosecutor's argument
11 that the blood evidence "came back" to the named individuals. The prosecutor succinctly
12 prefaced the contested comments about the blood evidence by accurately stating that the
13 job of a serologist such as Harmor was to "either include people or exclude people as being
14 the source of the blood." (RT 2862.)

15 At trial, Gary Harmor testified that six individuals were tested against the blood
16 evidence - the four Magoon family members and the two co-defendants. With respect to
17 the blood found on the trigger guard of the Ruger, Harmor stated that all of the individuals
18 were excluded except for Petitioner, as follows: "If we look at the 6 different knowns that
19 were submitted, Jaime Hoyos is the only one that's a 1.1, 1.2. So he could be the donor of
20 that." (RT 3696.) Harmor testified that the results of testing the blood on the air rifle
21 trigger guard "are consistent with Jaime Hoyos but excludes the other people listed on this
22 chart." (RT 3698.) With respect to the blood on the barrel of that air rifle, Harmor stated
23 that: "Mary Magoon would be included as a potential donor for this stain, but the other 5
24 individuals would be eliminated." (RT 3699.)

25 Harmor also testified about blood stains found on several different areas of
26 Petitioner's pants, stating that "only Jaime Hoyos could be the donors of the samples 1
27 through 8." (RT 3701.) Concerning another stain found on the lower pant leg, Harmor
28 testified that: "Mary Magoon would be the potential donor of that type. She's in the group
that could have donated it, and the other 5 people are excluded." (RT 3702.) Harmor stated

1 that yet another stain had two potential donors, including Daniel Magoon and the Magoons'
2 youngest son J., while the other four individuals were excluded. (RT 3703.) On cross-
3 examination, defense counsel elicited that with respect to the samples that came back to
4 Hoyos, Harmor could not definitively state that the blood belonged to Petitioner, explaining
5 that: "I can say it's consistent with people like him, but I can't say it's from him only."
6 (RT 3718.)

7 Petitioner argues that the prosecutor's remarks about the blood on Petitioner's pants
8 and on the Ruger originating from Petitioner constituted prejudicial misconduct because:
9 "Neither statement was supported by the actual evidence, but the jury had no reason to
10 know that, and therefore would have been biased against Petitioner even before the
11 beginning of evidence." (Pet. Brief at 37.) First, consistent with the prosecutor's argument,
12 Harmor testified that several blood stains on Petitioner's pants and those on the Ruger
13 excluded those tested, but included Petitioner. More importantly to the claim presented
14 here, Petitioner fails to offer any evidence to support his assertion that the prosecutor's
15 argument biased the jury against him. A review of the entire record supports the opposite
16 conclusion, as prior to opening arguments, the trial court specifically directed the jurors to
17 keep an open mind throughout the proceedings and to refrain from making any decision
18 until the conclusion of the evidence, instructing:

19 So don't decide this case based upon the opening statements of the
20 lawyers. Don't decide this case based upon the first witness that's called on
21 direct examination or cross examination, or the second or the third or whatever
22 witnesses may be called. Wait until all evidence is presented by all parties,
23 both in the sense of prosecution evidence, defense evidence, rebuttal evidence,
24 whatever evidence is offered by anybody. Wait till all the evidence is in, and
reserve judgment until everything is in and then I give you the instructions on
the law.

25 So we all have a tendency to, potentially anyway, rush to judgment.
26 Don't do that. Keep an open mind until this matter is entirely concluded.

27 (RT 2776.) Immediately prior to opening statements, the trial court also explicitly
28 instructed the jurors that the arguments of counsel were not evidence, as follows:

1 The opening statements of the lawyers in any case, of course, do not
2 constitute evidence. The evidence that you will be hearing comes from the
3 witness stand. The evidence is comprised of the sworn testimony of
4 witnesses, documents that may be introduced, diaphragms [sic], photographs
5 and so forth. The lawyers' statements to you, while not evidence, could best
6 be characterized, I suppose, as a description of what the lawyers feel will, in
7 fact, be forthcoming during the evidentiary portion of the trial.

8 (RT 2851.) The trial court repeated this admonition at the end of the guilt phase, reminding
9 the jurors that: "Statements made by the attorneys during the trial are not evidence." (RT
10 4261.)

11 A jury is presumed to understand and follow the trial court's instructions. Weeks,
12 528 U.S. at 234; Marsh, 481 U.S. at 211; see also Miller, 483 U.S. at 766 n.8 ("We normally
13 presume a jury will follow an instruction to disregard inadmissible evidence inadvertently
14 presented to it,") As the record is absent any indication that the jurors exhibited any
15 confusion about these instructions, this Court must therefore presume the jurors
16 comprehended and followed the trial court's direction. Petitioner fails to show that the
17 prosecutor's argument was improper, much less that it "so infected the trial with
18 unfairness as to make the resulting conviction a denial of due process." Darden, 477 U.S.
19 at 181, quoting Donnelly, 416 U.S. at 643.

20 Even if Petitioner could demonstrate misconduct, in light of the trial court's clear
21 instructions to the jury that the statements of counsel were not evidence and cautioning
22 them to refrain from making any judgment until the close of evidence, the Court cannot
23 conclude that these comments had a "substantial and injurious effect or influence in
24 determining the jury's verdict." Brecht, 507 U.S. at 637; see also Wood v. Ryan, 693 F.3d
25 1104, 1113 (9th Cir. 2012) ("On habeas review, constitutional errors of the 'trial type,'
26 including prosecutorial misconduct, warrant relief only if they 'had substantial and
injurious effect or influence in determining the jury's verdict.'"), quoting Brecht, 507 U.S.
at 637-38.

27 As the comments at issue here did not constitute misconduct, the Court cannot fault
28 trial counsel for failing to object. Indeed, the Ninth Circuit has recognized that "[b]ecause

1 many lawyers refrain from objecting during opening statement and closing argument,
2 absent egregious misstatements, the failure to object during closing argument and opening
3 statement is within the ‘wide range’ of permissible professional legal conduct.”
4 Cunningham, 704 F.3d at 1159, quoting United States v. Necoechea, 986 F.2d 1273, 1281
5 (9th Cir. 1993) (bracket in original).

6 In any event, the claim is without merit because Petitioner fails to demonstrate
7 prejudice. See Mirzayance, 556 U.S. at 122 (“[A] defendant must show both deficient
8 performance and prejudice in order to prove that he has received ineffective assistance of
9 counsel.”), citing Strickland, 466 U.S. at 687. In view of the fact that the jury was
10 repeatedly instructed that the arguments of counsel were not evidence, and were further
11 cautioned to keep an open mind until the presentation of evidence was concluded, the Court
12 finds no “reasonable probability that, but for counsel’s unprofessional errors, the result of
13 the proceeding would have been different.” Strickland, 466 U.S. at 694.

14 Based on a review of the remarks in the context of the entire record, the Court cannot
15 conclude that the California Supreme Court’s rejection of this claim was contrary to, or
16 involved an unreasonable application of, clearly established federal law, or that it was
17 based on an unreasonable determination of the facts. Petitioner is not entitled to habeas
18 relief or an evidentiary hearing on Claim 15. See Totten v. Merkle, 137 F.3d 1172, 1176
19 (9th Cir. 1998) (“[A]n evidentiary hearing is *not* required on issues that can be resolved by
20 reference to the state court record.”)

21 **4. Claim 16**

22 Petitioner contends that the prosecutor also committed misconduct during guilt
23 phase closing arguments when he “argued to the jury that the forensic methodology used
24 to analyze the spot of blood found on petitioner’s pants was invented by a Nobel Prize
25 winner, thus vouching for its reliability, and that this prize winning methodology
26 established there was a 93 to 94 percent chance that the blood was that of Mary Magoon,”
27 which violated Petitioner’s due process rights. (SAP at 82.) Petitioner also alleges that
28 trial counsel’s failure to object constituted ineffective assistance of counsel. (Id.)

1 Petitioner requests an evidentiary hearing on this claim. (Id. at 55.)

2 Petitioner raised this claim as Claim 8 in the first state habeas petition. (Lodgment
3 No. 106.) The California Supreme Court summarily denied the claim on the merits and
4 alternately held that aside from the allegation of ineffective assistance of counsel, the claim
5 was barred because it was not preserved in the trial court. (Lodgment No. 118.) For the
6 reasons discussed above in the section III.A., the Court will address the merits of this claim.

7 At trial, serologist Gary Harmor testified about DNA testing, and in particular, the
8 PCR method for copying and testing small samples of genetic material. Harmor testified
9 that the developer of the method, Kary Mullis, had recently received a Nobel prize. (RT
10 3682.) Discussing the potential usefulness of the method in comparing samples, Harmor
11 was asked if the test was used as an “excluder” or an “includer,” and testified that:

12 Its main purpose is as an excluder because the power of the test is about 93
13 percent to 94 percent. In other words, what that means is that if you were to
14 take my blood and the court reporter’s blood and test it, 94 percent of the time
15 we would be able to tell the difference between the two of us. 6 percent of
the time we would match by chance. [¶] So it’s basically most useful as an
excluder. That’s the most definitive statement we can say.

17 (RT 3682-83.)

18 During closing arguments, defense counsel referenced the blood testing and
19 Harmor’s testimony on the matter, and argued the following:

20 Now, Mr. Harmor gave his own example of the unreliability of the PCR
21 testing. If you recall he gave the example of if, for example, a test was made
22 of his blood and the court reporter’s blood, he said that if you did it a hundred
23 times, 6 percent of the time or 6 times it will come back a match. So out of a
hundred times - - and you can check the transcript - - he said that 6 percent of
the time there is a mistake. So you have a 6 percent error ratio in this, in the
24 PCR testing. [¶] Now to reverse that, if you took two samples of his own
25 blood, then, of course, tested it a hundred times, then 6 times it will come back
not his blood and 94 times his blood, if you took the same samples and tested
them.

27 (RT 4097-98.) Defense counsel then went on to challenge the numbers and percentages
28 Harmor discussed during his testimony. (RT 4098-4107.)

1 During rebuttal argument, the prosecutor addressed defense counsel's closing and
2 discussion of Harmor's testimony, as follows:

3 Mr. Herrera talked to you about D.N.A., the D.N.A. evidence with respect to
4 Gary Harmor. He told you that there was a six percent error in D.N.A.
5 evidence, a six percent error. So out of every hundred times you test it and
6 use the court reporter and Mr. Harmor as an example, every hundred times
you test it, six percent of the time there could be an error.

7 Let's hear what Mr. Harmor said because it wasn't read to you.

8 Question, "Is this method used - - I think you mentioned it, but just to reiterate,
9 is it an excluder or includer?"

10 The Court: Please read slowly for the benefit of our court reporter.

11 Mr. Greenberg: I will. I'm sorry.

12 Answer, "Its main purpose is as an excluder because the power of the test is
13 about 93 percent to 94 percent. In other words, what that means is that if you
14 were to take my blood and the court reporter's blood and test it, 94 percent of
15 the time we would be able to tell the difference between the two of us. Six
16 percent of the time we would match by chance."

17 Not error, by chance. There is no error. A man won a Nobel prize for this
18 technique. There is no error.

19 (RT 4197-98.) After a brief discussion of the blood sample statistics and population
20 studies, the prosecutor again referenced the testing method, stating: "There was a Nobel
21 prize. It's used to detect genetic disease, sickle cell anemia, anthropologists use it. This is
22 a reliable technique, no doubt about it." (RT 4198.)

23 The Court finds no error in this argument. The prosecutor quoted directly from the
24 trial transcript in referencing Harmor's testimony about the PCR method, and again
25 referenced Harmor's testimony that the scientist who formulated that procedure won a
26 Nobel prize. Moreover, a review of the record clearly reflects that the remarks here were
27 made in direct response to the closing arguments of defense counsel, who argued that there
28 was a "6 percent error ratio" in the testing method. Thus, even were the Court to conclude

1 that the remarks are improper, it is clear that the rebuttal comments were an “invited
2 response” to the defense’s closing argument, and in context, did not constitute misconduct.
3 See United States v. Young, 470 U.S. 1, 5, 12-14 (1985) (improper prosecutorial remarks
4 on rebuttal did not rise “to the level of ‘plain error’ when he responded to defense counsel”
5 by expressing his belief in the defendant’s guilt because defense counsel’s closing
6 argument asserted “that the Government did not believe in its own case.”) The Supreme
7 Court has emphasized that:

8 In order to make an appropriate assessment, the reviewing court must not only
9 weigh the impact of the prosecutor’s remarks, but must also take into account
10 defense counsel’s opening salvo. Thus the import of the evaluation has been
11 that if the prosecutor’s remarks were ‘invited,’ and did no more than respond
12 substantially in order to ‘right the scale,’ such comments would not warrant
reversing a conviction.

13 Id. at 12-13. Here, the remarks were obviously made as a direct response to defense
14 counsel’s assertion that the 6 percent figure represented an “error ratio” and that Harmor
15 had discussed the unreliability of the testing method. The prosecutor quoted from and
16 referenced Harmor’s trial testimony in clear rebuttal to the defense’s allegations. If there
17 was any error, it was invited by defense counsel’s own arguments, and in any event did not
18 “so infect[] the trial with unfairness as to make the resulting conviction a denial of due
19 process.” Darden, 477 U.S. at 181, quoting Donnelly, 416 U.S. at 643. Finally, as noted
20 above with respect to Claim 15, at the conclusion of counsels’ guilt phase arguments, the
21 trial court again reminded the jurors that: “Statements made by the attorneys during the
22 trial are not evidence.” (RT 4261.) Again, the jury is presumed to understand and follow
23 the trial court’s instructions. Weeks, 528 U.S. at 234; Richardson, 481 U.S. at 211; see
24 also Greer, 483 U.S. at 766 n.8.

25 Accordingly, considering the remarks in the context of the trial as a whole, because
26 the comments were a direct and equivalent response to defense counsel’s own argument,
27 consisted of direct citations and references to trial testimony, and the trial court repeatedly
28 reminded the jurors that the arguments of counsel were not evidence, Petitioner cannot

1 demonstrate that the prosecutor's rebuttal argument had a "substantial and injurious effect
2 or influence in determining the jury's verdict." Brecht, 507 U.S. at 637.

3 With respect to Petitioner's claim of ineffective assistance of counsel for failing to
4 object to the rebuttal argument, as noted above, a counsel's failure to object to argument is
5 generally considered to be within the "'wide range' of permissible professional legal
6 conduct." Cunningham, 704 F.3d at 1159, quoting Necoechea, 986 F.2d at 1281.
7 Considering that the comments at issue were a response to defense counsel's own argument
8 and consisted, in large part, of direct quotations to trial testimony, the Court does not find
9 that the argument contained any such "egregious misstatements" that should have
10 reasonably engendered an objection from defense counsel. At any rate, the contention also
11 fails for lack of prejudice, because the remarks did not rise to the level of constitutional
12 error and the Court finds no "reasonable probability that, but for counsel's unprofessional
13 errors, the result of the proceeding would have been different." Strickland, 466 U.S. at
14 694.

15 Based on a review of the rebuttal argument in the context of the entire record,
16 Petitioner has not demonstrated that the California Supreme Court's rejection of this claim
17 was contrary to, or involved an unreasonable application of, clearly established federal law,
18 or that it was based on an unreasonable determination of the facts. Neither habeas relief
19 nor an evidentiary hearing is warranted on Claim 16. See Totten, 137 F.3d at 1176 ("[A]n
20 evidentiary hearing is *not* required on issues that can be resolved by reference to the state
21 court record.")

22 **D. Additional Claims of Ineffective Assistance of Counsel**

23 **1. Claim 17**

24 Petitioner alleges that trial counsel rendered ineffective assistance in failing to
25 pursue a ruling on the admissibility of Petitioner's custodial statements to police, asserting
26 that the statements were involuntary because Petitioner had requested an attorney during
27 an interrogation that took place two days earlier. (SAP at 85-87.) Petitioner requests an
28 evidentiary hearing on this claim. (Id. at 55.)

1 Petitioner raised this claim as Claim II in the first state habeas petition, and the
2 California Supreme Court rejected it on the merits without a statement of reasoning. (See
3 Lodgment Nos. 106, 118.)

4 In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held in part that
5 after a person held for interrogation is provided with the required warnings, “[i]f the
6 individual states that he wants an attorney, the interrogation must cease until an attorney is
7 present.” Id. at 474. Later, in Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme
8 Court held that “when an accused has invoked his right to have counsel present during
9 custodial interrogation, a valid waiver of that right cannot be established by showing only
10 that he responded to further police-initiated custodial interrogation even if he has been
11 advised of his rights. We further hold that an accused, such as Edwards, having expressed
12 his desire to deal with the police only through counsel, is not subject to further interrogation
13 by the authorities until counsel has been made available to him, unless the accused himself
14 initiates further communication, exchanges, or conversations with the police.” Id. at 484-
15 85 (footnote omitted); see also Arizona v. Roberson, 486 U.S. 675, 683 (1988) (“As a
16 matter of law, the presumption raised by a suspect’s request for counsel - that he considers
17 himself unable to deal with the pressures of custodial interrogation without legal assistance
18 - does not disappear suddenly because the police have approached the suspect, still in
19 custody, still without counsel, about a separate investigation.”); see also Maryland v.
20 Shatzer, 559 U.S. 98, 109-11 (2010) (affirming that “the [Edwards] prohibition applies, of
21 course, when the subsequent interrogation pertains to a different crime, when it is
22 conducted by a different law enforcement authority, and even when the suspect has met
23 with an attorney after the first interrogation,” but holding that it does not apply when there
24 has been a break in custody longer than fourteen days) (internal citations omitted).

25 Petitioner and his co-defendant Alvarado were arrested in the early morning hours
26 of May 27, 1992, on drug and weapons charges. (Lodgment No. 107, Exs. 9, 12.) At the
27 El Cajon Police Department, Petitioner was separated from Alvarado and interviewed, with
28 a border patrol agent acting as a Spanish language interpreter. (Id., Ex. 12.) Petitioner was

1 advised of his rights in Spanish, stated that he understood those rights and “requested to
2 speak with an attorney prior to any questioning. Subsequently so, no statements were
3 obtained of him.” (Id.) At 9 p.m. on May 29, 1992, two detectives with the Sheriff’s
4 Homicide Detail interviewed Petitioner at the San Diego central jail. (Id., Ex. 11.) The
5 detectives stated that they wanted to talk to Petitioner about the homicides in Jamul,
6 indicated that the interview would be conducted in Spanish and read Petitioner his Miranda
7 rights, to which Petitioner stated he understood his rights. (Id. at 1-2.) The officers asked
8 what Petitioner knew about the murders and Petitioner stated that “I didn’t have anything
9 to do with that.” (Id. at 3.) Petitioner stated that he was with his wife and children that
10 evening in El Cajon, and discussed his whereabouts and activities that day and evening.
11 (Id. at 3-12.) Petitioner denied knowing anything about the homicides, where the gun or
12 marijuana found in the car came from, and denied that he killed the victims. (Id. at 11-13.)
13 Petitioner denied ever being in the home, denied knowing the Magoons, but acknowledged
14 knowing the area where the house was located. (Id. at 13-17.) Petitioner also repeatedly
15 denied knowing where the marijuana found in the car came from, and denied knowing
16 about the gun or rifles in the home or car. (Id. at 18-20.) He denied knowing anything
17 about the shooting of the Magoons’ young son. (Id. at 22-23.) After Petitioner was asked,
18 “Or are you so cold hearted that you don’t care. How would you like it if someone did that
19 to your family?” Petitioner replied, “Until, I’m not going to speak until my attorney is
20 present.” (Id. at 24.) The interview transcript reflects that tape was then shut off and the
21 transcript ended. (Id.) Petitioner was arraigned on June 2, 1992 and requested appointed
22 counsel; the request for counsel was granted and the public defender was appointed. (CT
23 10-11.)

24 The record reflects that with respect to the motion to exclude any admissions by
25 Alvarado on the basis of voluntariness, the trial court stated that “[t]he prosecution in this
26 case has advised that no admissions/confessions to law enforcement will be offered in this
27 case. Accordingly, the court will grant the motion in limine and order no statements to be
28 provided absent some further hearing.” (RT 1215; see also CT 3475.) The prosecutor also

1 advised that: “I’m not giving up my right to introduce evidence either to impeach the
2 defendant if he were to testify or rebuttal depending on what evidence might come out.”
3 (RT 1216.) Both the prosecutor and counsel for Alvarado agreed that they could postpone
4 any discussion on the matter. (*Id.*) With respect to Petitioner’s own motion to exclude
5 admissions, the prosecutor similarly stated that: “In our case in chief there will be no
6 statements to law enforcement made by Mr. Hoyos,” and that: “I think the only time it
7 would be in issue is if Mr. Hoyos were to testify.” (RT 1226.) In response, the trial court
8 stated: “I suppose the best way to do it is to grant the motion in that the prosecution will
9 not be offering statements, and to the extent they are going to be offered, that it will be
10 necessary to have a hearing out of the presence of the jury.” (*Id.*) Defense counsel made
11 no objection to the trial court’s ruling on the matter.

12 Petitioner argues that “[c]ounsel was ineffective for failing to point out to the court
13 that the statements were not merely extracted in violation of Miranda, but were involuntary
14 under Edwards, and thus not admissible for impeachment. Petitioner was substantially
15 prejudiced because the trial court relied on those statements to cure the prejudice from the
16 prosecutor’s failure to disclose the Jiminez [sic] recantation.” (Pet. Brief at 41.)

17 However, even if the Court were to assume, without deciding, that counsel acted
18 deficiently in failing to pursue a motion to exclude Petitioner’s statement on the basis of
19 voluntariness, the claim fails for lack of prejudice, as Petitioner fails to demonstrate “a
20 reasonable probability that, but for counsel’s unprofessional errors, the result of the
21 proceeding would have been different.” Strickland, 466 U.S. at 694. Petitioner’s
22 statements to police were not introduced at trial. Instead, Petitioner’s assertion of prejudice
23 hinges on a rather tenuous chain of logic. During the post-guilt phase hearing on the
24 defense motion for a new trial based on the belatedly disclosed Jimenez statements,
25 Petitioner and Alvarado each contended that had they known of Jimenez’s credibility
26 problems, they would have testified at trial. The prosecutor, in turn, argued that Jimenez’s
27 prospective testimony would not have impeached Petitioner, only his co-defendant
28 Alvarado, and thus would have had no direct impact on Petitioner’s decision to testify. The

1 prosecutor added that Petitioner had his own reasons to decline to testify and alluded to
2 Petitioner's statements to authorities. Petitioner presently asserts that trial counsel was
3 ineffective in failing to contest the voluntariness of those statements to police, as
4 successfully excluding those statements would have negated them as a factor in Petitioner's
5 decision to testify and removed them from the trial court's consideration of the Brady issue.
6 Petitioner asserts that “[t]he prejudice thus accrues in counsel's failure to obtain a ruling as
7 to the involuntariness of the statements, and demonstrates that fear of impeachment was
8 not a reason that petitioner declined to testify, but rather because a [sic] of the joint defense
9 agreement with Alvarado.” (Reply at 82-83.) Petitioner specifically contends that “[t]he
10 prosecutor argued, *and the trial court accepted*, that even if petitioner was
11 unconstitutionally deterred from testifying at the guilt trial because of fear of the admission
12 of Jimenez's statement attributed to Alvarado, petitioner's testimony would have been
13 impeached by his own custodial statements and, therefore, it was unlikely that he would
14 have attained a more favorable result.” (SAP at 86) (emphasis added.)

15 While the prosecutor argued the custodial statements were another potential reason
16 that Petitioner declined to testify, the record does not reflect that the trial court considered
17 those statements, much less relied on them, in rejecting Petitioner's motion for a new trial.
18 In fact, when the prosecutor referenced Petitioner's statements to the authorities in arguing
19 that Petitioner's decision not to testify was impacted by factors other than the prospect of
20 Jimenez's testimony, the trial court professed ignorance as to the substance of those
21 statements. (See RT 4639-40, 4695.) The trial court acknowledged the existence of the
22 statements, but clearly articulated that the basis for the denial of the motion for a new trial
23 was that Petitioner, unlike Alvarado, was not directly impacted by Jimenez's prospective
24 testimony, reasoning that: “I'm really having difficulty in seeing how your representation,
25 you gentlemen's representation of Hoyos, was affected adversely when he could testify if
26 he wanted to. Of course, if he would testify, he's got to face any statements he may have
27 made to the law enforcement -- he being Hoyos -- and I'm not privy to all those statements,
28 but he could testify.” (RT 4695.)

1 Indeed, a review of the record shows that the trial court's ultimate conclusion was
2 clearly based on the lack of a constitutional violation given that Jimenez's statements only
3 impeached Petitioner's co-defendant, and does not reflect that the decision was impacted
4 by, or based in any measure on, the contested custodial statements, as follows: "I find there
5 is no cognizable constitutional violation of Mr. Hoyos' rights by virtue of the prosecutor
6 in this case failing to disclose information about a co-defendant that could be used to
7 impeach a witness called against a co-defendant, if in fact that co-defendant chose to
8 testify." (RT 4727-28.) The trial court discussed Alvarado's statement to Jimenez, and
9 noted that it had been excluded under Aranda and Bruton because Alvarado used the word
10 "we," which implicated both himself and Petitioner. (RT 4728.) The trial court reasoned
11 that "[t]hat statement, however, was made by Alvarado, not in the presence of Hoyos who
12 was in a completely different area. It had application to Alvarado, not to Hoyos, who
13 wasn't even there. It cannot be imputed to Hoyos." (RT 4729.) The trial court reasoned
14 that: "Each of these individuals had different degrees and levels of culpability. Hoyos was
15 not subject to impeachment in any respect by Jiminez [sic]. It's frankly just too speculative
16 to say that a failure to provide information to Alvarado which could truly be used against
17 Alvarado if Alvarado testified, if the jail house informant testified - - it's just too
18 speculative. [¶] There isn't any Sixth Amendment violation that I see as to Mr. Hoyos in
19 this case. He could have testified in this case without any fear of impeachment by Jiminez
20 [sic]. He chose not to do so. In fact, he chose not to do so in advance for reasons, as it
21 seems, to be more akin to familial considerations. We sink or swim together, this sort of
22 approach. That's not cognizable as a constitutional violation. He made a decision and the
23 potential impeaching information of the informant as to his co-defendant is not really of
24 constitutional significance as to Mr. Hoyos. So in all respects, Mr. Hoyos' motion is going
25 to be denied." (RT 4729-30.)

26 Thus, regardless of whether trial counsel acted deficiently in failing to seek, and
27 perhaps obtain, a ruling excluding the use of Petitioner's custodial statements at trial for
28 any purpose, the fact remains that those statements were never introduced at trial and the

1 record fails to support a finding of prejudice. Accordingly, the claim of ineffective
2 assistance of counsel fails on the merits. See Strickland, 466 U.S. at 697 (“If it is easier to
3 dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we
4 expect will often be so, that course should be followed.”)

5 Because Petitioner fails to demonstrate that the California Supreme Court’s rejection
6 of this claim was contrary to, or an unreasonable application of, clearly established federal
7 law, or that it was based on an unreasonable determination of the facts, he is not entitled to
8 habeas relief. Nor is an evidentiary hearing warranted on Claim 17. See Sully, 725 F.3d
9 at 1075 (“[A]n evidentiary hearing is pointless once the district court has determined that
10 § 2254(d) precludes habeas relief.”)

11 **2. Claim 18**

12 Petitioner contends that trial counsel rendered ineffective assistance of counsel for
13 failing to move to exclude Petitioner’s statements to police on the basis of delay in
14 arraignment and appointment of counsel, pursuant to County of Riverside v. McLaughlin,
15 500 U.S. 44 (1991). (SAP at 89-90.) Petitioner requests an evidentiary hearing on this
16 claim. (Id. at 55.)

17 Petitioner raised this claim as Claim III in the first state habeas petition, and the
18 California Supreme Court rejected it on the merits without a statement of reasoning. (See
19 Lodgment Nos. 106, 118.)

20 Petitioner and Alvarado were arrested in the early morning hours of May 27, 1992,
21 on drug and weapons charges. (Lodgment No. 107, Exs. 9, 12.) After Miranda warnings
22 were administered, Petitioner requested to speak to an attorney prior to questioning. (Id.,
23 Ex. 12.) At 9 p.m. on May 29, 1992, just after Petitioner and Alvarado were arrested on
24 murder and attempted murder charges, two detectives with the Sheriff’s Homicide Detail
25 interviewed Petitioner at the San Diego central jail. (Id., Exs. 9, 12.) Those detectives
26 administered Miranda warnings and Petitioner spoke to them and made numerous
27 statements denying any knowledge of the victims and crimes before again stating: “I’m not
28 going to speak until my attorney is present.” (Lodgment No. 107, Ex. 11 at 24.) Petitioner

1 was arraigned on June 2, 1992 at 2 p.m. on murder, attempted murder, robbery, burglary,
2 and drug and weapons charges, and requested appointed counsel; the request for counsel
3 was granted and the public defender was appointed. (CT 10-11.)

4 In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that “[w]hatever
5 procedure a State may adopt, it must provide a fair and reliable determination of probable
6 cause as a condition for any significant pretrial restraint of liberty, and this determination
7 must be made by a judicial officer either before or promptly after arrest.” Id., 420 U.S. at
8 124-25 (footnotes omitted). In County of Riverside, the Supreme Court articulated that “a
9 jurisdiction that provides judicial determinations of probable cause within 48 hours of
10 arrest will, as a general matter, comply with the promptness requirement of Gerstein.” Id.,
11 500 U.S. at 56. The Supreme Court further held that “[w]here an arrested individual does
12 not receive a probable cause determination within 48 hours, the calculus changes. In such
13 a case, the arrested individual does not bear the burden of proving an unreasonable delay.
14 Rather, the burden shifts to the government to demonstrate the existence of a bona fide
15 emergency or other extraordinary circumstance.” Id. at 57.

16 In this case, Petitioner faults counsel for failing to pursue a motion to exclude
17 Petitioner’s statements based on the delay in arraignment and appointment of counsel,
18 arguing that “[c]ounsel could not have had a tactical reason for failing to pursue this
19 meritorious argument, because counsel did file a separate motion to exclude the custodial
20 statements on the basis of Miranda violations and involuntariness. Given counsel’s
21 manifest intent to seek the exclusion of petitioner’s custodial statements, counsel’s
22 performance was deficient in failing to invoke a remedy that was equally or more
23 meritorious than the one he did pursue.” (SAP at 90.)

24 “[A] defendant must show both deficient performance and prejudice in order to
25 prove that he has received ineffective assistance of counsel.” Mirzayance, 556 U.S. at 122,
26 citing Strickland, 466 U.S. at 687. Relevant to this contention, the Ninth Circuit has held
27 that: “When the Sixth Amendment ineffective assistance of counsel claim is rooted in
28 defense counsel’s failure to litigate a Fourth Amendment issue, as it is here, petitioner must

1 show that (1) the overlooked motion to suppress would have been meritorious and (2) there
2 is a reasonable probability that the jury would have reached a different verdict absent the
3 introduction of the unlawful evidence.” Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1170
4 (9th Cir. 2003), citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) and Strickland,
5 466 U.S. at 687-88, 691-92, 694.

6 Even if the Court were to assume, without deciding, that any such motion to exclude
7 Petitioner’s statements based on delay was meritorious and would have been successful, as
8 with the prior argument raised in Claim 17, this claim too fails for lack of prejudice. First,
9 Petitioner cannot show any “reasonable probability” of a different result in the absence of
10 Petitioner’s statements, as those statements were never introduced at trial. Ortiz-Sandoval,
11 323 F.3d at 1170. Similar to Claim 17, Petitioner instead argues that he was prejudiced
12 “because the fruits of the unlawfully extracted statements were relied on by the prosecutor
13 and the trial court to deny his motion for mistrial.” (SAP at 91.) Yet, as discussed in detail
14 above, a review of the record shows that the trial court’s ruling was explicitly based on the
15 lack of a constitutional violation given that Jimenez’s statements impeached Alvarado and
16 did not directly impact Petitioner’s decision whether or not to testify. The record further
17 reflects that the trial court’s decision made scant mention of the custodial statements, other
18 than when the trial court noted that he remained unaware of the substance of any such
19 statements. The record fails to support Petitioner’s argument that the court “relied on” the
20 statements in denying the motion for a new trial, and in fact supports a conclusion that the
21 trial court’s decision was instead based on the fact that Petitioner failed to demonstrate that
22 his decision to testify was directly influenced by the potential impeachment of his co-
23 defendant. As such, Petitioner cannot show “a reasonable probability that, but for
24 counsel’s” failure to pursue a motion to exclude the custodial statements based on
25 unreasonable delay in arraignment, “the result of the proceeding would have been
26 different.” Strickland, 466 U.S. at 694. As with the prior claim, this contention fails for
27 lack of prejudice. See id. at 697 (“If it is easier to dispose of an ineffectiveness claim on
28 the ground of lack of sufficient prejudice, which we expect will often be so, that course

1 should be followed.”)

2 Because Petitioner fails to demonstrate that the California Supreme Court’s rejection
3 of this claim was contrary to, or an unreasonable application of, clearly established federal
4 law, or that it was based on an unreasonable determination of the fact, habeas relief is
5 unavailable. Petitioner is not entitled to an evidentiary hearing on Claim 18. See Sully,
6 725 F.3d at 1075.

7 **3. Claims 19, 20 and 21**

8 In Claim 19, Petitioner contends that counsel was ineffective for failing to
9 “investigate and present evidence impeaching the prosecution’s forensic DNA evidence,”
10 noting that the defense retained an expert to counter the prosecution’s evidence, but failed
11 to call him to testify at the Kelly/Frye¹⁷ hearing or at trial, leaving the prosecution’s
12 evidence unchallenged. (SAP at 91-93.) In Claim 20, Petitioner contends that trial counsel
13 “was aware of the incriminating content of Gary Harmor’s testimony for the prosecution,
14 not only regarding DNA evidence, but also regarding blood-typing tests and results,” yet
15 was ineffective in failing to prepare and present available evidence to counter his
16 testimony, particularly with respect to Harmor’s errors and use of statistics, at the
17 Kelly/Frye hearing or trial. (Id. at 104-05.) In Claim 21, Petitioner contends that counsel
18 “failed to investigate and present expert testimony that Harmor’s methodology was
19 scientifically flawed and entirely unreliable,” contending that Harmor testified that test
20 results showed Petitioner’s blood was found on a firearm in the victims’ home, despite the
21 actual lack of a match. (Id. at 110-11.) Petitioner requests an evidentiary hearing on each
22 of these three claims. (Id. at 55.)

23
24
25 ¹⁷ Kelly /Frye was a California state law test concerning the admissibility of expert
26 testimony based on new types of scientific evidence or techniques. See People v. Kelly, 17
27 Cal.3d 24 (1976); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). It is currently known
28 as the Kelly test, as Frye’s application in federal court has since been superceded by the
Federal Rules of Evidence and the test announced in Daubert v. Merrell Dow
Pharmaceuticals, Inc., 509 U.S. 579 (1993).

1 Petitioner raised these claims as Claims VI, VII, and IX, respectively, in the first
2 state habeas petition, and the California Supreme Court rejected all three claims on the
3 merits without a statement of reasoning. (See Lodgment Nos. 106, 118.)

4 As discussed above, “a defendant must show both deficient performance and
5 prejudice in order to prove that he has received ineffective assistance of counsel.”
6 Mirzayance, 556 U.S. at 122, citing Strickland, 466 U.S. at 687. Moreover, on habeas
7 review, “[t]he pivotal question is whether the state court’s application of the Strickland
8 standard was unreasonable.” Richter, 562 U.S. at 101.

9 **A. Kelly/Frye Standard and Hearing**

10 “Under Kelly/Frye, ‘the proponent of evidence derived from a new scientific
11 methodology must satisfy three prongs, by showing, first, that the reliability of the new
12 technique has gained general acceptance in the relevant scientific community, second, that
13 the expert testifying to that effect is qualified to do so, and, third, that correct scientific
14 procedures were used in the particular case.’” Cooper v. Brown, 510 F.3d 870, 944 n. 28
15 (9th Cir. 2007), quoting People v. Roybal, 19 Cal. 4th 481, 505 (1998).

16 Prior to trial, the court held a Kelly/Frye hearing on the admissibility of the DNA
17 evidence, specifically concerning the PCR technique used to analyze the blood evidence.
18 The trial court took judicial notice of numerous transcripts in other judicial proceedings
19 and treatises on the matter. (RT 1348-51, 1368-78.) The parties offered argument and the
20 prosecution cited to a number of prior judicial proceedings that had been noticed. (RT
21 1351-66.) The prosecution also presented the testimony of Gary Harmor, a senior forensic
22 serologist and case work analyst at the Serological Research Institute [“SERI”], who
23 conducted the DNA analysis in this case.

24 Harmor, who had been employed by SERI for 15 years and currently held the title
25 of Senior Forensic Serologist, performed the case work analysis on Petitioner’s case. (RT
26 1379-80.) Harmor discussed his background, training, as well as the development of DNA
27 analysis. (RT 1380-86.) In particular, Harmor discussed the PCR/DQ-Alpha technique,
28 his experience with it, and his prior testimony in 170 cases, including his prior

1 qualifications as an expert and testimony in 18-20 cases in the past three years. (RT 1386-
2 88.) Harmor discussed testing protocols and addressed differences between amplification
3 methods and procedures between laboratories; he acknowledged that sometimes it became
4 necessary to add more enzyme, dilute the sample with water, or add bovine serum albumin
5 [“BSA”] to overcome inhibition, a “process that stops the copying of the particular target
6 site of DNA.” (RT 1388-92.) Harmor testified that the methods used to overcome
7 inhibition did not run a risk of producing unreliable or inaccurate results and stated that
8 “[i]t is important to the analyst to get results in a case. So even if the phenomenon of
9 inhibition [sic] observed when you know there is sufficient DNA, human DNA to arrive at
10 a result, it’s better to try to get an answer for the case. Because possibly potentially it could
11 be exculpatory to a defendant.” (RT 1392.) Harmor also discussed the various laboratories
12 that used PCR testing, and stated that such testing was widespread across the United States,
13 as well as throughout other countries and continents. (RT 1393-95.)

14 On cross-examination by defense counsel, Harmor addressed the ways in which his
15 work deviated from the written user guide, such as his use of ammonia and saline instead
16 of water for some samples, and his addition of BSA to overcome inhibition. (RT 1396-
17 97.) Harmor acknowledged that the addition of BSA was not in the protocol, and obtained
18 information about its use through peers, seminars, and published papers. (RT 1397-98.)
19 Harmor added BSA in this case because there was inhibition, in that the sample did not
20 amplify without it. (RT 1399.) Harmor also acknowledged there was contamination in
21 one result, from the jeans, but explained that it was in one result on the reagent blanks, and
22 stated that “[t]here is no evidence that the contaminant was throughout the whole test. If
23 it had been I would not have called the results.” (RT 1400-01.) Harmor and counsel had
24 a brief exchange about population statistics, and Harmor stated that he compiled his
25 statistics using published data and arrived at figures for California and the San Diego area.
26 (RT 1402-03.) SERI performed both internal and external quality control, and often
27 exchanged samples with other labs. (RT 1403-05.) Harmor reiterated that he had testified
28 over one hundred times as a forensic serologist in the past 14 years, in 18 states and 20

1 California counties, and had testified approximately “20 times as a PCR expert in 8
2 different states.” (RT 1406.)

3 After hearing argument from counsel, the trial court issued a written ruling on the
4 admissibility of the DNA evidence, denying the motion to exclude that evidence and
5 concluding that “the voluminous materials reviewed by this court, as well as the witnesses
6 proffered by the People cause this court to believe that PCR-DNA is a relatively new
7 scientific technology which is generally accepted as reliable in the relevant scientific
8 community, that the sources furnishing evidence of this are properly qualified experts and
9 the use of proper scientific procedures was present in this particular case.” (CT 2929.)

10 **B. Harmor’s Trial Testimony**

11 At trial, Harmor first discussed his training and background, similar to his testimony
12 at the Kelly/Frye hearing, and testified generally about DNA evidence, ABO blood typing,
13 and PCR testing in particular. (RT 3763-82.) With respect to PCR evidence, Harmor stated
14 that: “Its main purpose is as an excluder,” and stated that the same was true about ABO
15 blood type testing. (RT 3682-83.) Harmor also generally discussed the use of statistics
16 and population studies in determining the frequency of markers, as well as noted other
17 “conventional” testing methods, such as Gm and Km markers, both using ABO typing.
18 (RT 3683-85.)

19 Harmor testified that he received samples from six individuals concerning this case,
20 including Daniel and Mary Magoon, the two Magoon children, and both defendants, as
21 well as the crime scene samples. (RT 3685-86.) Harmor first detailed the markers found
22 in each individuals’ samples and those found in the crime scene blood samples. (RT 3687-
23 90.) Harmor concluded that Petitioner “could be” the donor of the blood found on the
24 Ruger’s trigger guard, and that the other individuals were excluded as potential donors.
25 (RT 3696.) With respect to the gun’s stock, Harmor stated that the sample, which came
26 back as 1, 3, 11, was “probably an incomplete Gm type” and reasoned that because
27 “generally we see the 21 factor with this” type, he concluded that sample was “consistent”
28 with Petitioner, whose Gm type was 1, 3, 11, 21, and Harmor stated that the results

1 excluded the other five individuals tested. (RT 3697-98.) Harmor further testified that
2 Mary Magoon was included as a possible donor of blood found on the air rifle barrel, while
3 the other individuals were eliminated. (RT 3698-99.) Harmor stated that the blood on the
4 hallway bathroom door was also consistent with Mary Magoon, and again, the other five
5 individuals were excluded. (RT 3699.)

6 Harmor testified that Petitioner was the only one of the six individuals tested that
7 could be the donor of eight samples found on Petitioner's jeans. (RT 3701.) He also
8 testified that Mary Magoon was a potential donor of another sample found on the jeans,
9 with the others excluded, and that both Daniel Magoon and J. Magoon were potential
10 donors of two other samples, with the others excluded. (RT 3702-03.) Harmor also
11 testified at length about the population frequency of the markers, for instance, that the type
12 found on the Ruger trigger guard was found in 5.2% of the population in San Diego and
13 5.3% in California, or 1 in 19 individuals. (RT 3705-08.)

14 On cross-examination, Harmor acknowledged that there was a user guide, which
15 contained the instructions for conducting PCR analysis and outlined the reagents and
16 materials to be used in the analysis. (RT 3708-09.) Harmor also acknowledged that in this
17 case, there was some contamination found in one of the three control samples, the reagent
18 control sample, which was not supposed to contain DNA, but did. (RT 3710-12.) Harmor
19 testified that: "I believe that I inadvertently got some stray DNA into the blank control on
20 one test while I was processing the DNA." (RT 3712.) When asked if he followed the user
21 guide, Harmor first stated that there are other recommendations in literature on ways to
22 overcome inhibition, including throwing out the sample, adding more TAQ enzyme, and
23 adding BSA. (RT 3714.) After counsel again asked if Harmor followed the user guide,
24 Harmor replied that: "It's not strictly followed as a user guide was given to us. We use it
25 as a basis for developing our procedure," and stated that: "I followed it as far as it went, as
26 far as the instructions were concerned on how to process the DNA and how to amplify the
27 DNA with a few minor modifications that aren't strictly in the protocol." (RT 3715.)
28 Harmor used a substance called BSA, which he had previously discussed with his peers

1 and read about in literature, to amplify the material in this case. (RT 3715-16.)

2 Harmor again discussed the results of his testing and his reports, including a
3 typographical error about Petitioner being included and excluded as a donor of several
4 samples; Harmor issued a correction of that page in his report. (RT 3717-18.) Harmor
5 acknowledged that he could not conclude that the blood on the jeans came from Petitioner
6 himself, stating that: “I can say it’s consistent with people like him, but I can’t say it’s from
7 him only.” (RT 3718.) Harmor agreed that according to a population frequency of 1 in
8 625, it meant that out of 62,500 people, 100 could have contributed one of the samples,
9 and agreed that for another sample, the ratio was 1 in 15. (RT 3719-20.) Harmor also
10 agreed that some results were incomplete, and explained that he added two types together
11 to come up with a frequency, which eliminated three Magoons, stating that: “It was enough
12 of a sample to come to a partial result. It wasn’t sufficient, in my opinion, to give a result
13 for all the Gm markers.” (RT 3723.) Harmor agreed that most stains on Petitioner’s jeans
14 were too small to test and he did not even attempt the basic Gm analysis. (Id.) Harmor
15 also conceded that it was possible to have inconsistent Gm and DQ Alpha results. (RT
16 3724.) After additional discussion on population frequencies, Harmor also acknowledged
17 that a death row inmate brought civil charges against SERI and his supervisor Wraxall;
18 while Harmor worked at SERI at the time, he was not named in the suit. (RT 3726-27.)
19 Upon inquiry, Harmor also acknowledged that no one at the SERI lab received a Nobel
20 prize. (RT 3727.) On cross-examination by Alvarado’s counsel, Harmor agreed that none
21 of the blood results “implicate or suggest” Alvarado. (RT 3728.)

22 On redirect, Harmor noted that other individuals, including defense personnel, were
23 present to observe some of the testing in this case; he provided copies of results and reports
24 to all involved entities. (RT 3729.) Several samples were too small for certain tests and
25 Harmor again addressed the testing performed on Petitioner’s jeans. (RT 3729-30.) With
26 respect to the results of 1, 3, 11 accompanied by an asterisk, Harmor explained that: “I
27 didn’t say but some of the samples did show a faint 21, but not enough to make a positive
28 determination.” (RT 3730.) He reaffirmed that Petitioner was not excluded as a donor of

1 the blood on the air rifle stock and trigger guard, as follows: "Based on my results I have
2 no way to say that that blood is different from Hoyos. There could be other people in the
3 population that could have that set of type as well, but he's certainly not excluded." (RT
4 3730-31.) Harmor testified that he used BSA in the amplification of several items,
5 including stains on a shirt and a number of small stains on the jeans, stated that his lab as
6 a whole used BSA in their "quality control cocktail," and he had no doubts about the results
7 obtained. (RT 3731-32.) On recross, defense counsel and Harmor had the following
8 exchange:

9 Q: Mr. Harmor, you may not have any doubts of your results, but would it
10 be fair to say there is some doubt whether or not Mr. Hoyos is the person who
11 contributed the unknown samples that are attributed to him?

12 A: Yes. Again, he's consistent with - - the stains that were his types that
13 are similar to him show up. But I cannot say it's definitely him in the group
14 that could have donated it. And we have talked about the percentage.

15 (RT 3732-33.) Harmor also stated that while defense personnel were present for earlier
16 tests, they were not present for later tests discussed in his final report. (RT 3733.)

17 C. Evidence Presented in Post-Conviction Proceedings

18 In addition to submitting the reports generated by Gary Harmor in advance of trial
19 (Lodgment No. 110, Exs. 39 and 47), Petitioner submits a copy of the FBI Laboratory's
20 DQ Alpha Typing Protocol (id., Ex. 41), which was also discussed at trial.

21 Petitioner presents a letter and later declaration from Marc Taylor, a consultant who
22 worked with the defense at the time of trial concerning the DNA evidence. In a letter dated
23 November 11, 1993, prior to trial, Taylor wrote to Richard Fox, the defense's consulting
24 criminalist, after reviewing the DNA testing performed by SERI. (Id., Ex. 40.) Taylor
25 stated that the "general appearance of the data is well organized and appears to give valid
26 justification for the conclusions outlined in the reports of 12 July 1993 and 22 September
27 1993." (Id.) Taylor indicated that the "data is fairly complete with regard to the processing
28 of the DNA after extraction, however there are no details of how the evidence was handled
or the DNA extracted from the individual items." (Id.) Taylor stated that because

1 extraction “is one of the most critical steps in DNA typing and extraction is where the most
2 severe mistakes, that I am aware of, have occurred,” information about those procedures is
3 important to obtain. (Id.) While Taylor indicated that “SERI has utilized appropriate
4 controls during the extraction and amplification steps and the results of these controls
5 generally indicated that adequate procedures were followed,” but that “the results of the
6 controls alone, without the specifics of the protocol followed, are not sufficient to fully
7 evaluate the procedures utilized.” (Id.) Taylor also specifically noted that one extraction
8 blank was contaminated, as it should not have contained any DNA, yet “it did contain
9 DNA, having at least four of the DQ-Alpha alleles present.” (Id. at 1-2.) Taylor stated that
10 this occurred in the jeans sample and that “[w]hile the level of contamination in this control
11 is low, it is significant, and when a control such as this is contaminated test results of any
12 items extracted with this control specimen must be interpreted with extreme caution or not
13 interpreted at all.” (Id. at 2.) After identifying that item, Taylor concluded by stating that
14 “[b]ased on the data I reviewed, I see no other areas in which I would disagree with the
15 conclusions outlined in the two reports noted above.” (Id.)

16 Taylor later submitted a 2006 declaration in support of the state habeas petition, in
17 which he elaborates on his training, education and experience and discusses his work on
18 Petitioner’s case in 1993 and Harmor’s test results and trial testimony. (Id., Ex. 42.) Taylor
19 repeats his earlier statement that one of the control samples for the testing on the jeans in
20 Petitioner’s case was contaminated and “[t]hat when a control such as this is contaminated,
21 test results of any items extracted with this control sample must be interpreted with extreme
22 caution or, as with many laboratory protocols, not interpreted at all.” (Id. at 3.) Taylor
23 states that Harmor “negates the significance of the contamination of a reagent blank in his
24 testimony” and states that “reagent blanks are controls that are utilized to evaluate the
25 integrity of the testing process, and their contamination indicates that there are problems
26 with the testing process itself. Such contamination events can lead to false inclusions or
27 exclusions in certain circumstances.” (Id. at 4.) Taylor further states that not only did the
28 reagent blank contain DNA, so did the substrate controls, and “therefore, Mr. Harmor’s

1 explanation that this contamination was not of concern because his substrate controls did
2 not type, is not accurate.” (Id. at 5-6.) Taylor states that “in most laboratories, the
3 procedure followed when contamination of a reagent blank is encountered, is to retest the
4 samples if possible. This retesting requires starting over with the original stained material
5 and proceeding with clean reagents and component procedures to assure no contamination
6 will take place. Results from this testing can then be relied upon.” (Id. at 6.)

7 Petitioner also submits a 2006 declaration from forensic scientist Keith Inman, who
8 also reviewed Harmor’s work and states that with respect to the testing and analysis of the
9 bloodstains found on Petitioner’s jeans, the air rifle trigger guard and the air rifle barrel
10 “significant departure from correct scientific procedure exists.” (Id., Ex. 50 at 1.) Inman
11 criticizes Harmor’s conclusion that the Gm type on the jeans was likely 1, 3, 11, 21,
12 consistent with Hoyos and reasoning that the 1, 3, 11 result was possibly due to the 21
13 being weak. (Id. at 2.) Inman states that “[n]o scientific support exists for this explanation
14 of the data,” and explains that Harmor’s “analytical notes clearly indicate that the sample
15 types as a 1, 3 ; ; 11. No indication exists in his notes that the stain is weak.” (Id.) Inman
16 first states that “[i]t is unusual in my experience for one G3m marker to be detected and
17 another to go undetected,” and then asserts that “Harmor’s logic is clearly flawed. While
18 it may be true that it is possible (under unusual circumstances) for the 21 marker to go
19 undetected, it does not follow logically that the sample *therefore is* 21 positive.” (Id.)
20 (emphasis in original.) Inman further states that Harmor’s analysis that the sample in
21 question is “consistent with the majority of the other stains on this item” is not objective,
22 but instead “injects a subjective bias into the interpretation of the data. This is an example
23 of poor scientific reasoning, and is not supported by the analytical data for this sample.”
24 (Id.)

25 With respect to the bloodstains on the stock and trigger guard of the air rifle, Inman
26 states that Harmor “makes an assertion not contained in his report” during his trial
27 testimony, that “some of the samples showed a faint 21, but not enough to make a positive
28 determination.” (Id.) Inman states that Harmor’s notes “reveal that the controls for the 21

1 did not work properly" and that "[t]he only acceptable scientific remedy for a failed control
2 is to repeat the test, or to consider the test results inconclusive (proceed as if the test had
3 not been run). It is incorrect scientific procedure to call any sample positive - e.g. in the
4 extant case to call a '21' - when the controls have failed, and it is flawed scientific logic to
5 opine that the likely type is something not supported by the data." (Id. at 2-3.) Inman
6 concludes that the results for the bloodstains on those parts of the air rifle "are not supported
7 by the analytical data, correct scientific procedures were not followed when questionable
8 data was obtained, and Mr. Harmor employed flawed scientific reasoning when
9 interpreting and reporting his results." (Id. at 3.)

10 Petitioner also submits a 2006 declaration from William Thompson, a California bar
11 member and college professor whose academic focus is DNA evidence and its role in
12 criminal trials. Thompson states that "[i]n my opinion, Mr. Harmor's testimony was
13 misleading and inappropriate. It greatly exaggerated the value of this biological evidence
14 for incriminating Mr. Hoyos." (Lodgment No. 113, Ex. 113 at 1.) Similar to Inman's
15 conclusions, Thompson criticizes Harmor's scientific reasoning that the samples on the
16 two areas of the air rifle could have come from Petitioner as "stunningly illogical and
17 unscientific," and states that "Mr. Harmor's analysis twisted a putatively scientific test into
18 an exercise in speculation and (perhaps) wishful thinking." (Id. at 2.) Thompson states
19 that "Mr. Harmor then made matters worse by presenting irrelevant and misleading
20 statistical estimates that greatly exaggerated the value of the evidence for linking Mr.
21 Hoyos to the rifle," because Petitioner did not "exactly" match the markers on the rifle yet
22 Harmor testified about the frequency in the population of those that would match the
23 markers exactly. (Id. at 2-3.) Similar to both Taylor's and Inman's statements, Thompson
24 criticizes Harmor's failure to repeat the test on Petitioner's jeans after positive DNA results
25 were found in a control that was not supposed to contain any DNA, stating that "[i]n my
26 view, Mr. Harmor failed to follow proper and accepted scientific procedures with respect
27 to this test and his results (with respect to the jeans) should therefore be viewed with
28 suspicion." (Id. at 4.)

1 Finally, Petitioner submits a declaration from Arturo Herrera, one of his two trial
2 attorneys, who offers a statement with respect to the DNA and blood evidence:

3 5. The DNA and blood analyses were a critical part of the prosecution's case.
4 In the spring of 1993, the prosecutor retested Mr. Hoyos's blue jeans, and
5 informed us that Mr. Hoyo's [sic] pants contained blood spatter, or very small
6 dots of blood that originated from within two feet of the source, that belonged
7 to Mary Magoon, and to either Daniel or J[] Magoon. In the late Summer of
8 1993, we were informed that blood had been found on the trigger guards of
9 two rifles found in the Magoon house, and that blood from Mr. Hoyos was
10 identified as being on each one, including one that also had Mary Magoon's
11 blood on it. The trial judge refused to give us a continuance to prepare for
12 this new evidence, but the court of appeal granted our writ of mandate. We
13 contacted Richard Fox; but Mr. Fox, although familiar with blood-typing, was
14 not familiar with the DNA typing done in our case. He referred us to Marc
15 Taylor of Technical Associates.

16 6. Mr. Taylor reviewed our discovery, and provided us with materials from
17 other cases challenging the new procedures used in our case. I went to Mr.
18 Taylor's office in Pasadena to become educated on the technical aspects of
19 this testing, and got my first introduction to polymerase chain reaction, or
20 PCR, a technique for amplifying small amounts of DNA. He sent us materials
21 that we attached to our motion to exclude the testimony based on DNA testing.
22 I remember talking about the issue of contamination with him.

23 7. I have been shown a copy of Mr. Taylor's November 1993 letter to Mr.
24 Fox about this case. Regarding the issue of contamination, he stated that one
25 particular part of the testing - that part concerning Mr. Hoyos's jeans - was
26 contaminated, and should "be interpreted with extreme caution, or not at all."
27 At the *Kelly-Frye* hearing, and at trial, I brought out the fact that there was
28 contamination somewhere in the tests run by Mr. Gary Harmor, the
prosecution's witness as part of my cross-examination. I did not, however,
and could not, reply to Mr. Harmor's assertion that it didn't matter. It would
have been very helpful to have an expert say what Mr. Taylor's report says,
both to the trial court and, if necessary, to the jury, and talk about why the
contamination might have made a difference in the identification of a
particular individual. I found Mr. Taylor to be knowledgeable and clear. I
cannot explain why we did not call him as a witness. I cannot remember
talking with Mr. Fox about any aspect of the blood evidence.

(Lodgment No. 110, Ex. 44 at 2-3.)

D. Discussion

Petitioner first challenges trial counsel's performance at the Kelly/Frye hearing, faulting both counsel's failure to call an expert witness with respect to the third prong of the test concerning whether "correct scientific procedures" had been followed and for failing to challenge the reliability of Harmor's statistical analysis. In a declaration submitted during post-conviction proceedings, trial counsel Herrera acknowledges that the defense retained Marc Taylor as an expert consultant on the DNA evidence and that he met with Taylor to discuss the evidence and contamination, but states that he "cannot explain" why Taylor was not called to testify.

However, the record reflects that just prior to the Kelly/Frye hearing, the trial court and both parties discussed the anticipated length of that hearing, and during that discussion Herrera stated: “I don’t expect to present testimony. My expert is going to be here to see if any problems develop that he needs to advise us on. If he needs to testify, it will be short.” (RT 1311.) Strickland dictates that “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id., 466 U.S. at 690. In light of the clear showing from both the declaration and trial record that counsel retained and consulted with an expert prior to the Kelly/Frye hearing and relied on that expert in conducting the hearing itself, Petitioner fails to overcome the presumption that counsel’s decisions were within the bounds of constitutionally acceptable conduct. See Strickland, 466 U.S. at 690-91 (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”)

In any event, Respondent accurately points out that the third prong of Kelly/Frye requires the trial court to determine whether correct scientific procedures were employed in the case, and under California law, errors or mistakes by an individual analyst impacts the “weight” rather than the “admissibility” of the evidence in question and does not

1 implicate Kelly/Frye, as follows:

2 The *Kelly* test's third prong does not, of course, cover all derelictions in
3 following the prescribed scientific procedures. Shortcomings such as
4 mislabeling, mixing the wrong ingredients, or failing to follow routine
5 precautions against contamination may well be amenable to evaluation by
6 jurors without the assistance of expert testimony. Such readily apparent
7 missteps involve "the degree of professionalism" with which otherwise
8 scientifically accepted methodologies are applied in a given case, and so
amount only to "[c]areless testing affect[ing] the weight of the evidence and
not its admissibility" (*Farmer, supra*, 47 Cal.3d at p. 913, *Cooper, supra*, 53
Cal.3d at p. 814).

9 People v. Venegas, 18 Cal. 4th 47, 81 (1998) (brackets in original); see also Daubert, 509
10 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful
11 instruction on the burden of proof are the traditional and appropriate means of attacking
12 shaky but admissible evidence.") Therefore, even were Petitioner able to demonstrate
13 deficient performance, despite the record evidence supporting a conclusion that counsel
14 made a reasoned and tactical decision not to call an expert at the hearing, any alleged
15 deficiencies in counsel's performance at the Kelly/Frye hearing could not have resulted in
16 prejudice. This is because the hearing was limited to the admissibility of DNA evidence
17 resulting from use of the PCR technique, rather than the adequacy of Harmor's analysis,
18 and Petitioner fails to demonstrate that Taylor's testimony could have changed the outcome
19 of the Kelly/Frye hearing. See Strickland, 466 U.S. at 694 (in order to demonstrate
20 prejudice, "[t]he defendant must show there is a reasonable probability that, but for
21 counsel's unprofessional errors, the result of the proceeding would have been different.")
22 The California Supreme Court's rejection of his claim of ineffective assistance of counsel
23 at the Kelly/Frye hearing was neither contrary to, nor an unreasonable application of,
24 Strickland.

25 Petitioner also challenges counsel's performance at trial, asserting that counsel
26 rendered ineffective assistance in failing to present evidence to challenge the reliability of
27 the blood and DNA evidence and regarding flaws in Harmor's analysis through the
28 testimony of Taylor and Inman, and in failing to present evidence about the lack of

1 reliability in Harmor's statistical analysis, as discussed by both Inman and Thompson.

2 While Petitioner contends that counsel failed to present expert testimony to
3 challenge Harmor's analysis, he fails to show that this alleged error did not result from a
4 tactical decision. Trial counsel now states in his declaration that even though he cross-
5 examined Harmor, he "could not [] reply to Mr. Harmor's assertion that [the
6 contamination] didn't matter," that "[i]t would have been very helpful to have an expert
7 say what Mr. Taylor's report says, both to the trial court and, if necessary, to the jury, and
8 talk about why the contamination might have made a difference in the identification of a
9 particular individual," and that he "cannot explain why we did not call him as a witness."
10 (Lodgment No. 110, Ex. 44 at 3.) Yet in Strickland, the Supreme Court specifically
11 cautioned against reviewing a claim of ineffective assistance in this manner, reasoning that
12 "[i]t is all too tempting for a defendant to second-guess counsel's assistance after
13 conviction or adverse sentence, and it is all too easy for a court, examining counsel's
14 defense after it has proved unsuccessful, to conclude that a particular act or omission of
15 counsel was unreasonable." Strickland, 466 U.S. at 689. The Court stated that "[a] fair
16 assessment of attorney performance requires that every effort be made to eliminate the
17 distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged
18 conduct, and to evaluate the conduct from counsel's perspective at the time." Id. Indeed,
19 "the relevant inquiry under Strickland is not what defense counsel could have pursued, but
20 rather whether the choices made by defense counsel were reasonable." Siripongs, 133 F.3d
21 at 736.

22 The record reflects trial counsels' repeated attempts to retain DNA and blood
23 experts. Counsel moved to continue the trial, which was scheduled to begin on October 1,
24 1993, after receiving Harmor's revised report in late September 1993, stating in a
25 declaration that they had contacted and attempted to retain experts such as Fox, Taylor, Dr.
26 Simon Ford, and Ed Blake, and that: "All of the expert consultants, spoken to by the
27 defense, have told us that they do not take cases which are in progress. Dr. Fox and Dr.
28 Taylor, our first choices as consultants simply will not agree to be retained if our case, in

1 fact, begins trial on October 1, 1993.” (CT 308.) At a motion hearing, counsel stated that
2 they had also contacted Professor Thompson, who “would not take on the case as a
3 consultant if the case proceeds to trial today,” and had spoken with personnel at a DNA lab
4 in North Carolina, who “could not guarantee that they could do the work while the case is
5 pending.” (RT 117.) The trial court denied the motion for a continuance. However, after
6 action by the appellate court on October 6, 1993, staying the case, the trial court continued
7 the trial date to January 7, 1994. (CT 3456.)

8 The record reflects that trial counsel retained, at a minimum, Richard Fox and Marc
9 Taylor to consult with on the blood and DNA evidence. (See Lodgment No. 110, Exs. 42,
10 44.) It is evident that counsel also was specifically aware of the contamination issue, as he
11 recalled discussing that matter with Taylor. (See *id.*, Ex. 44.) As noted above, counsel
12 cross-examined Harmor about the contamination at the Kelly/Frye hearing. It is also clear
13 that counsel stated on the record, prior to the Kelly/Frye hearing, that he did not expect to
14 call Taylor to testify at that hearing. Counsel also extensively cross-examined Harmor on
15 the issues raised by Inman, Thompson and Taylor, including the contamination issue,
16 procedures Harmor employed, results of testing, and the statistical analysis. For instance,
17 on cross-examination by counsel, Harmor acknowledged there was contamination in the
18 control samples, stating that: “I believe that I inadvertently got some stray DNA into the
19 blank control on one test while I was processing the DNA.” (RT 3712.) Harmor also
20 admitted that he deviated from the user guide in his attempts to overcome inhibition,
21 explaining that: “I followed [the user guide] as far as it went, as far as the instructions were
22 concerned on how to process the DNA and how to amplify the DNA with a few minor
23 modifications that aren’t strictly in the protocol.” (RT 3715.) Harmor also conceded that
24 he could not conclusively identify the samples that included Petitioner as actually
25 attributable to Petitioner, stating that: “I can say it’s consistent with people like him, but I
26 can’t say it’s from him only.” (RT 3718.) Defense counsel also challenged the value of
27 Harmor’s statistical analysis, and Harmor conceded that depending on the population size,
28 the samples in question could match a large number of people. (RT 3718-22.) Indeed,

1 counsel and Harmor also had the following exchange, in which Harmor agreed that there
2 was room for doubt that Petitioner contributed the evidence recovered from the crime
3 scene:

4 Q: Mr. Harmor, you may not have any doubts of your results, but would it
5 be fair to say there is some doubt whether or not Mr. Hoyos is the person who
6 contributed the unknown samples that are attributed to him?

7 A: Yes. Again, he's consistent with - - the stains that were his types that
8 are similar to him show up. But I cannot say it's definitely him in the group
9 that could have donated it. And we have talked about the percentage.

10 (RT 3732-33.)

11 “[T]he presentation of expert testimony is not necessarily an essential ingredient of
12 a reasonably competent defense.” Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995);
13 see also Richter, 562 U.S. at 111 (“Strickland does not enact Newton’s third law for the
14 presentation of evidence, requiring for every prosecution expert and equal and opposition
15 expert from the defense. In many instances cross-examination will be sufficient to expose
16 defects in an expert’s presentation.”) Regardless of Herrera’s declaration, in which he
17 states he “cannot explain” why Taylor was not called to testify, it is apparent from the
18 record that trial counsel extensively investigated the DNA and blood match evidence, by
19 consulting with and retaining appropriately qualified experts, and challenging Harmor on
20 numerous issues, including contamination, Harmor’s procedures, statistics and results,
21 through cross-examination. These actions were reasonable and are entitled to deference.
22 See Siripongs, 133 F.3d at 736 (“[T]he relevant inquiry under Strickland is not what
23 defense counsel could have pursued, but rather whether the choices made by defense
counsel were reasonable.”)

24 Even if Petitioner was able to demonstrate that counsel erred in not calling expert
25 witnesses to refute Harmor’s analysis and conclusions, the claim also fails for lack of
26 prejudice. See Strickland, 466 U.S. at 691 (“An error by counsel, even if professionally
27 unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the
28 error had no effect on the judgment.”) Again, counsel’s cross-examination of Harmor

1 effectively challenged his analysis and conclusions, by pointing out his deviations from the
2 user's guide and contamination, bringing to light the fact that the statistics allowed for
3 hundreds or even thousands of individuals to be included as potential donors of the
4 samples, and pointing out that Harmor could only state that Petitioner was not excluded as
5 a potential source of the samples in question and could not, in fact, state that it was actually
6 Petitioner's blood found on the air rifle or jeans.

7 Even had counsel presented expert testimony to further undermine and challenge
8 Harmor's analysis and testimony, there remained significant and weighty evidence
9 connecting Petitioner to the murders and other offenses apart from the blood and DNA
10 evidence. Shortly after midnight on the evening of the murder, Petitioner and Alvarado
11 were stopped by police for a broken tail light at a location that was about a fifteen minute
12 drive from the Magoon home. (RT 3071.) An hour or two prior to that stop, several
13 neighbors heard a succession of firecrackers or gunshots from the vicinity of the Magoon
14 home. (RT 2919-24, 3517-21.) The police stated that Alvarado, who was driving, was
15 sweaty and shaking, and the weather was neither particularly hot nor cold; upon searching
16 the vehicle, the police found a 9mm magazine containing 12 rounds, several large caliber
17 bullets and a loaded Helwan pistol in the car. (RT 2939-45.) The trunk of their car
18 contained a large quantity of marijuana; police noted some of it was in brick form and some
19 was ice cold "like it had been in a freezer." (RT 2947-48.) Upon a later search, police
20 found a shell casing in Alvarado's pocket, while Petitioner had over \$1,000 in cash in his
21 pants pockets. (RT 2949-54.) Meanwhile, there was marijuana debris both inside and
22 outside the freezer at the Magoon home, while James Johnson, Daniel Magoon's friend
23 and collaborator in drug dealing, stated that Daniel Magoon kept marijuana, in often large
24 amounts, in the freezer. (RT 3014-22, 3277-79.) The police also found 9mm shell casings
25 at the crime scene and an empty box for a Helwan pistol was found in a bathroom cabinet
26 in the Magoon home. (RT 3027-35, 3040-43.) Alvarado's fingerprints were matched to
27 prints on a 7-11 Big Gulp cup in the Magoons' kitchen. (RT 3191-92, 3367; CT 3338.)
28 Daniel Magoon's prints were lifted from tape used to package the marijuana. (RT 3193-

1 94, 3206-08, 3257, 3369-70; CT 3339.) Johnson recognized Petitioner as one of the
2 individuals who visited the Magoon home in the months prior to the murder and interacted
3 with Daniel Magoon. (RT 3279-81.) Meanwhile, Petitioner's friend Maribel Lopez stated
4 that she accompanied Petitioner to the Magoon home on multiple occasions. (RT 3402-
5 09.)

6 In light of counsel's extensive cross-examination of Harmor, as well as the strength
7 of the other evidence against him, Petitioner has not demonstrated a "reasonable probability
8 that, but for counsel's unprofessional errors" in failing to call expert witnesses to counter
9 Harmor's testimony, "the result of the proceeding would have been different." Strickland,
10 466 U.S. at 694. Given that Claims 19-21 fail on the merits, the Court is unable to conclude
11 that the California Supreme Court's rejection of these claims was objectively unreasonable.
12 See Richter, 562 U.S. at 101 ("The pivotal question is whether the state court's application
13 of the Strickland standard was unreasonable.") Petitioner is not entitled to habeas relief on
14 Claims 19, 20 or 21. Nor is an evidentiary hearing warranted on these claims. See Sully,
15 725 F.3d at 1075 ("[A]n evidentiary hearing is pointless once the district court has
16 determined that § 2254(d) precludes habeas relief.")

17 **4. Claim 22**

18 Petitioner asserts that the defense counsel presented at trial was prejudicially
19 ineffective because it was "inconsistent with the version of the events of March [sic] 26-
20 27 that petitioner had told him" and "was predicated entirely on the putative existence of a
21 sudden quarrel and shootout with Dan Magoon, without any comparable or complementary
22 defense as to the murder of Mary Magoon." (SAP at 112.) Specifically, Petitioner alleges
23 that "[c]ounsel failed to investigate and present substantial evidence of petitioner's lack of
24 involvement in the homicides, the likelihood of third party culpability, and the numerous
25 defects in the prosecution's forensic evidence," and "counsel failed to investigate and
26 present significant amounts of corroborating evidence to support the unsuccessful defense
27 that counsel did present." (SAP at 113-14) (emphasis in original.) Petitioner requests an
28 evidentiary hearing on this claim. (Id. at 55.)

1 Petitioner raised this claim as Claims XI and XII in the first state habeas petition,
2 and the California Supreme Court rejected the contentions on the merits without a
3 statement of reasoning. (See Lodgment Nos. 106, 118.)

4 As stated above, “a defendant must show both deficient performance and prejudice
5 in order to prove that he has received ineffective assistance of counsel.” Mirzayance, 556
6 U.S. at 122, citing Strickland, 466 U.S. at 687. “Judicial scrutiny of counsel’s performance
7 must be highly deferential.” Id. at 689. Because this Court is reviewing the California
8 Supreme Court’s adjudication of Petitioner’s claims of ineffective assistance of trial
9 counsel, the Court must not only apply Strickland, but AEDPA as well. “The standards
10 created by Strickland and § 2254(d) are both ‘highly deferential,’ . . . and when the two
11 apply in tandem, review is ‘doubly’ so.” Richter, 562 U.S. at 105, quoting Strickland, 466
12 U.S. at 689, Lindh, 521 U.S. at 333 n.7, Mirzayance, 556 U.S. at 123. “When § 2254(d)
13 applies, the question is not whether counsel’s actions were reasonable. The question is
14 whether there is any reasonable argument that counsel satisfied Strickland’s deferential
15 standard.” Richter, 562 U.S. at 105.

16 Petitioner’s first argument, that trial counsel was ineffective for failing to investigate
17 and present a defense of third party culpability and Petitioner’s lack of involvement in the
18 murders, was soundly rejected in Claim 14. It is apparent from the record that co-counsel
19 Herrera supported and supervised the investigation into alternate suspects, and case
20 manager Amendola as well as investigator Pickering made a concerted effort to identify
21 other individuals who could have been responsible for the murders. Petitioner told the trial
22 court after the verdicts that he had wanted to testify and that “[m]y attorney argued
23 something different than what I had told him.” (RT 4953.) Even were the Court to construe
24 this unspecific statement as supporting Petitioner’s contention that he wanted to testify in
25 order to deny any involvement in the murders, that defense counsel chose to pursue another
26 defense does not compel a finding that counsel acted deficiently. See Raley, 470 F.3d at
27 799 (“A disagreement with counsel’s tactical decisions does not provide the basis for
28 declaring that the representation was constitutionally deficient.”), citing United States v.

1 Mayo, 646 F.2d 369, 375 (9th Cir. 1981) (per curiam).

2 Petitioner's next contention, that the defense advanced at trial was infirm because it
3 lacked an adequate defense to the Mary Magoon murder in comparison to the defense
4 asserted for the Daniel Magoon murder, is refuted by the record. The state record plainly
5 reflects that the primary defense strategy, as set out in detail during closing arguments to
6 the jury, was to assert self-defense or manslaughter for the murder of Daniel Magoon and
7 second degree murder for Mary Magoon, thereby attempting to avoid a penalty phase and
8 a potential death sentence for the two deaths. (See RT 4057-58, 4062-63, 4065, 4079,
9 4084-87.) This strategy was clearly tactical, based on the evidence, and falls well within
10 the scope of "reasonable professional assistance." Strickland, 466 U.S. at 689.

11 Petitioner relatedly contends that trial counsel should have defended against the
12 Mary Magoon murder charge by presenting evidence that she was a partner in her
13 husband's drug business, was familiar with the use of weapons, was also high on cocaine
14 that evening, and probably used her son as a human shield. (SAP at 114.) The record
15 shows that trial counsel unsuccessfully attempted to introduce evidence about Mary
16 Magoon's prior use of, and familiarity with, weapons, as well as her presence at Daniel
17 Magoon's arrest ten years earlier, and decided to present propensity evidence only with
18 respect to Daniel Magoon. Because the evidence of Daniel Magoon's propensity for
19 violence was substantial, including his long-standing involvement in drug smuggling, prior
20 arrests, and that Jimmy Johnson knew him to answer the door armed, and the evidence
21 concerning Mary was largely based on Johnson's speculative statement that she might have
22 been going for a gun that evening, this was a reasonable decision entitled to deference.
23 Strickland, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's
24 conduct falls within the wide range of reasonable professional assistance; that is, the
25 defendant must overcome the presumption that, under the circumstances, the challenged
26 action 'might be considered sound trial strategy.'"), quoting Michel v. Louisiana, 350 U.S.
27 91, 101 (1955). As discussed in Claim 6, the evidence in the record fails to support a
28 defense theory that Mary Magoon presented a threat to the defendants, much less the

1 imminent threat necessary to justify the introduction of propensity type evidence.

2 Petitioner's remaining contentions about Mary Magoon's purported involvement in
3 her husband's drug activities and her actions on the evening of the murders are speculative
4 and similarly fail to support a claim of ineffective assistance of counsel. For instance,
5 federal habeas investigator Echeverria states that "[a]t the time of his death, Dan Magoon
6 was a drug and weapons trafficker and his wife, Mary Magoon, was involved with him in
7 that business," but fails to articulate a basis for this assertion. (Lodgment No. 120, Ex. 6
8 at 4.) The record lacks evidence that Mary Magoon had a direct involvement in her
9 husband's activities. Both James Johnson, who was involved with Daniel Magoon's drug
10 dealings, and his wife Oresta, only offered indications that Mary had some knowledge of
11 her husband's drug and weapon selling activities; neither stated that Mary had any
12 involvement. (See Lodgment No. 109, Exs. 29, 30.) In any event, trial counsel touched
13 on this matter in closing, noting that: "She was a partner, as I pointed out in opening, in
14 marriage. She was at least a silent partner as to the drug dealing." (RT 4053.)

15 Mary's drug use on the night of the murder was noted at trial, both during the
16 testimony of medical examiner Super, who noted the cocaine content in her blood, and in
17 defense counsel's arguments to the jury that both Daniel and Mary Magoon had drugs in
18 their system on the evening of the murders. (RT 3620, 4053.) However, Petitioner's
19 contention that counsel should have investigated and presented evidence about Mary
20 Magoon's "pervasive derelictions of her maternal duties with respect to her children,
21 presumably due to her chronic drug use" are speculative and conclusory. (See SAP at 114.)
22 In the state habeas petition, incorporated by reference, Petitioner argues that the condition
23 of the Magoon home was "slovenly," that J. in particular was experiencing developmental
24 delays, and "[h]ad social services learned of the conditions in which J[] was living in 1992,
25 regulations would have mandated immediate removal from that home." (Lodgment No.
26 106 at 126-27.) Petitioner further states that "[t]he house's deterioration suggests that Mary
27 had used cocaine for an extended period of time, and had probably developed a tolerance,"
28 and posits that "[h]ighly intoxicated people have used their own children as hostages, or

1 shields, in order to avoid seizures by the police, or to exploit another cocaine dealer,” and
2 includes several newspaper articles concerning such instances. (Id. at 127-28; Lodgment
3 No. 111, Ex. 63.) This argument appears to be based at least in part on the declaration of
4 health services management director Cherlyne Short Majors, who states she has over 30
5 years of experience in the fields of “child/maternal health and substance dependence.”
6 (Lodgment No. 111, Ex. 62.) Majors states that a “very substantial dose” of cocaine was
7 in Mary Magoon’s system at the time of her death, and opines that her review of materials
8 concerning the condition of the Magoon home, the family relationships, and autopsy
9 reports “suggests that Mrs. Magoon had used cocaine [or related stimulant] for a lengthy
10 period, and had likely developed a high tolerance.” (Id.) Majors opines that Mary Magoon
11 was “neurologically impaired” at the time of her death and that “[i]t is highly probable that
12 her movements in that moment of crisis did not comport to her own norms, much less the
13 norms of the larger society.” (Id.) Even were the Court to credit Majors’ opinion that
14 Mary was impaired at the time of her death, an assertion that Mary used her son as a shield
15 is without record support and cannot sustain a claim of ineffective assistance. James v.
16 Borg, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations which are not supported by
17 a statement of specific facts do not warrant habeas relief.”)

18 The remainder and bulk of this claim concerns allegations that trial counsel
19 inadequately challenged the prosecution’s case, primarily with respect to the forensic
20 evidence, and that counsel failed to present other available evidence in support of the
21 defense that was advanced at trial.

22 Petitioner focuses much of his argument on trial counsel’s alleged failures in
23 challenging the DNA, blood spatter and ballistics evidence, and characterizes “the failure
24 to retain a blood spatter expert to testify as to the unlikelihood that petitioner killed Mary
25 Magoon” as “the most significant and prejudicial aspect of counsel’s deficient
26 performance.” (Reply at 95) (emphasis in original.)

27 As an initial matter, the Court must address the declaration of George N. Crawford,
28 which was submitted as an exhibit to the federal petition in support of this claim, and on

1 which Petitioner significantly relies in support of his argument that trial counsel acted
2 deficiently in investigating his case and challenging the forensic evidence introduced at
3 trial. (See SAP at 115-17.) As noted previously, the instant claim was previously raised
4 as Claims XI and XII in the first state habeas petition, which was adjudicated in February
5 2009. (See Lodgment Nos. 106, 118.) Meanwhile, Crawford's declaration, federal habeas
6 Exhibit B, was signed in August 2010. (See ECF No. 54-4.) In Pinholster, the Supreme
7 Court held that "review under § 2254(d)(1) is limited to the record that was before the state
8 court that adjudicated the claim on the merits." Id., 563 U.S. at 181. Pursuant to Pinholster,
9 this Court cannot consider the Crawford declaration in deciding whether the California
10 Supreme Court's rejection of this claim was contrary to, or an unreasonable application of,
11 clearly established federal law, or was based on an unreasonable determination of the facts,
12 because this exhibit was not part of the state record at the time the issues were adjudicated
13 by the California Supreme Court. See id. at 182-83 ("It would be strange to ask federal
14 courts to analyze whether a state court's adjudication resulted in a decision that
15 unreasonably applied federal law to facts not before the state court.") Only if Petitioner
16 first satisfies section 2254(d) on the record which was before the state supreme court can
17 the Court consider this declaration.¹⁸

18

19

20 ¹⁸ In an Order dated January 4, 2011, three months before the Pinholster decision,
21 this Court denied Respondent's motion to dismiss Claim 22 for failing to exhaust state
22 remedies. (ECF No. 72 at 7-10.) This Court reasoned that the addition of the Crawford
23 declaration did not render Petitioner's claim unexhausted, stating that "[h]ere, in state
24 court, as in federal court, Petitioner claims that trial counsel was ineffective in failing to
25 investigate and present evidence in defense against the prosecution's case, specifically
26 concerning the physical and forensic evidence and Petitioner's alleged lack of involvement
27 in the crime." (Id. at 9-10.) This Court noted that the Crawford declaration, which
28 discussed several items of evidence previously addressed in the state habeas petition, also
"does appear to offer several new facts in support of Petitioner's claim." (Id. at 9.) While
the addition of those facts did not render the claim unexhausted, because the declaration
itself was not presented to the California Supreme Court, and clearly includes facts not
before that court, it would indeed be "strange" to consider those facts in deciding whether

1 The record reflects that trial counsel obtained expert assistance, by retaining
2 criminalist Parker Bell to assist the defense, and case manager Amendola recalled visiting
3 the crime scene with Bell, as follows:

4 Parker walked through the Magoons' house with us. He pointed out that the
5 ceilings were too low for anyone to have lifted the rifles to strike Mary with
6 them. There would have been marks or holes in the ceiling, but we didn't see
7 anything, nor any patching of marks or holes. When Parker Bell came for a
8 meeting, I remember laying on the floor and trying to be Mary and trying to
9 figure out where she was shot. I don't remember a decision not to use Parker
at trial, or being part of any discussion about it - - but I was gone months
before trial began.

10 (Lodgment No. 110, Ex. 48 at 3.) Yet, a declaration from state habeas counsel Michael
11 Snedeker indicates that Bell's last invoice was from February 1993, and notes that at that
12 time less than 40% of discovery was in, and was before the defense received the blood
13 analysis reports. (Lodgment No. 123, Ex. 7 at 1.) Snedeker states: "There is no record of
14 any other criminologist being hired by counsel for petitioner." (*Id.*) Assuming that another
15 criminologist was not retained, Petitioner fails to persuasively explain how this renders
16 trial counsel's performance deficient. The state record is bereft of any evidence reflecting
17 the work Bell performed, any reports generated, and what, if anything, additional
18 investigation could have produced. Available records reflect that counsel also contacted
19 and retained at least two other experts to consult on the forensic evidence, including
20 criminalist Richard Fox and Marc Taylor, an expert in criminalistics and DNA analysis.

21
22
23 the state supreme court's decision was unreasonable under section 2254(d). See Pinholster,
24 562 U.S. at 182-83.

25 At oral arguments, Petitioner responded to the Court's inquiry on this point in
26 apparent agreement that the exhibit could only be considered if Petitioner first satisfied
27 section 2254 on the record before the state court, stating that: "And Your Honor's question
28 about the impact of *Pinholster* case, our view is that if the Court concludes the California
Supreme Court was unreasonable in its decisions or its failure to conduct evidentiary
hearings, then the Crawford declaration, Exhibit B, can be used in weighing the prejudice
to Mr. Hoyos." (ECF No. 142 at 61.)

1 (Lodgment No. 110, Exs. 40, 44.) As discussed above, the record reflects that trial counsel,
2 after consulting with experts including Taylor and Fox, engaged in an extensive cross-
3 examination of prosecution witnesses Kennedy and Harmor about the blood spatter and
4 DNA evidence, which was a viable and reasonable tactical choice. See e.g. Bonin, 59 F.3d
5 at 834 (“[T]he presentation of expert testimony is not necessarily an essential ingredient of
6 a reasonably competent defense.”); Strickland, 466 U.S. at 689 (“There are countless ways
7 to provide effective assistance in any given case.”) As discussed below, even assuming
8 counsel acted deficiently in failing to adequately investigate and challenge the
9 prosecution’s forensic evidence, Petitioner fails to demonstrate prejudice.

10 In the first state habeas petition, and incorporated by reference in the instant Petition,
11 Petitioner lists a number of points aimed at criticizing the adequacy of the defense
12 presented at trial in an apparent attempt to buttress the contention that a different defense
13 theory, that of third party culpability, would have proven more successful. Among the
14 points Petitioner raises are the following: Petitioner states that the arresting officer did not
15 note any significant injuries to Petitioner’s person and questions how Petitioner’s blood
16 was found on one of the weapons at the scene, argues that the timing testimony provided
17 by witness Mary Lange does not match the prosecution’s theory nor the blood evidence,
18 questions why hair matching J. Magoon was found in both Daniel and Mary Magoon’s
19 hands, notes Alvarado’s print on the cup in the Magoon kitchen and questions why the
20 Magoons would have let them into the house given Johnson’s statements that Petitioner
21 and his companions showed up at all hours and made the Magoons nervous and scared,
22 and asserts that D. Magoon knew Petitioner as a friend of the family and told authorities
23 that Petitioner had not been to their home that evening. (Lodgment No. 106 at 135-46.)
24 With respect to Mary Magoon, Petitioner argues that her murder and the asserted torture
25 did not take place as the prosecution asserted, given the likelihood that Mary Magoon knew
26 the combination to the bedroom gun safe, the lack of blood in the bedroom and hall and
27 that she likely had a cigarette in her mouth. Petitioner argues that these facts refute the
28 contention that Mary Magoon was attacked in the bedroom and that they confirm that the

1 final shots were fired close in time and could not have constituted torture. (Id.)

2 As Strickland instructs, “[a] fair assessment of attorney performance requires that
3 every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
4 circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s
5 perspective at the time.” Id., 466 U.S. at 689. Petitioner “must overcome the presumption
6 that, under the circumstances, the challenged action ‘might be considered sound trial
7 strategy.’” Id., quoting Michel, 350 U.S. at 101. Instead of adhering to this standard,
8 Petitioner implores the Court to retrospectively evaluate counsel’s performance in a
9 manner explicitly discouraged by Strickland. The Court declines to do so, as the matters
10 Petitioner raises here could have been the result of trial counsel’s strategic decisions-
11 Petitioner provides no evidence to the contrary. See Burt v. Titlow, 571 U.S. ___, 134
12 S.Ct. 10, 17 (2013) (“It should go without saying that the absence of evidence cannot
13 overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of
14 reasonable professional assistance.’”) (bracket in original), quoting Strickland, 466 U.S. at
15 689.

16 For instance, Petitioner asserts that trial counsel was deficient in the “failure to elicit
17 from D[] that he knew petitioner as a friend of his father, and that petitioner had not gone
18 to his house that night, before, during, or after the shootings.” (SAP at 114) (emphasis in
19 original.) Petitioner relies on videotaped interviews with seven year old D., conducted
20 after the crimes, and contended in the state habeas petition that the reports summarizing
21 those interviews were “misleading” with respect to Petitioner. (Lodgment No. 106 at 145.)
22 While the record submitted to the Court does not contain copies of those videotaped
23 interviews, the Court will assume the truth of Petitioner’s account, that D. indicated in prior
24 interviews that Petitioner was a friend of his father’s and was not at the Magoon home that
25 evening. Yet, the record also reflects that D. also stated during prior interviews, and
26 testified at trial, that he was asleep during the murders and woke in the morning to find his
27 parents dead. (See e.g. RT 2894-97.) Absent any information or evidence to the contrary,
28 the Court must presume that the failure to question D. about this apparent inconsistency,

1 particularly in light of his young age and the traumatic experience he went through in
2 discovering his parents' bodies and then testifying about it at trial, "might be considered
3 sound trial strategy." Strickland, 466 U.S. at 689.

4 In addition, several of the inconsistencies in the prosecution's case Petitioner now
5 highlights were in fact brought out at trial and specifically discussed in defense counsel's
6 arguments to the jury to attack the prosecution's case as well as in support of the defense
7 theory that the murders were the result of an unexpected altercation rather than any planned
8 or premeditated crime. For instance, during closing arguments, trial counsel repeatedly
9 raised the fact that the arresting officer did not note any injuries to Petitioner and questioned
10 the test results and testimony that Petitioner's blood was found on both his pants and a
11 weapon recovered from the scene given his lack of injury. (See RT 4093-97, 4105-07.)
12 Defense counsel clearly attacked the prosecution's timeline and theory of the crimes,
13 asserting that the crimes were not planned nor were the events prolonged, but instead "was
14 five minutes to ten minutes of chaos." (RT 4055-62.) Defense counsel speculated in
15 closing that Mary Magoon went into the bedroom knowing the location of the secret
16 compartment and the Helwan, and addressed the lack of blood in the bedroom and argued
17 that it showed no torture took place in that room, which undermined the prosecution's
18 theory of the crime. (RT 4059-61.) Because counsel addressed these points at trial, either
19 through the introduction of evidence or arguments to the jury, they do not support this
20 claim of ineffective assistance.

21 Thus, for the reasons stated above, the California Supreme Court could have
22 reasonably rejected these contentions based on Petitioner's failure to satisfy Strickland's
23 performance prong, as Petitioner has not established that counsel's actions were
24 unreasonable, or that they fell outside the admittedly "wide range of reasonable
25 professional assistance." Strickland, 466 U.S. at 689; see also Siripongs, 133 F.3d at 736
26 ("[T]he relevant inquiry under Strickland is not what defense counsel could have pursued,
27 but rather whether the choices made by defense counsel were reasonable.")

28 ///

1 On this record, the California Supreme Court could also have reasonably rejected
2 this claim based on Petitioner's failure to demonstrate prejudice. Petitioner's primary
3 contentions are that trial counsel erred in attempting to avoid conviction on first degree
4 murder charges and a subsequent penalty phase proceeding rather than competently
5 investigating and presenting a different defense and that counsel failed to investigate and
6 adequately challenge the forensic evidence against Petitioner. "In a case in which
7 counsel's error was a failure adequately to investigate, demonstrating Strickland prejudice
8 requires showing both a reasonable probability that counsel would have made a different
9 decision had he investigated, and a reasonable probability that the different decision would
10 have altered the outcome." Bemore v. Chappell, 788 F.3d 1151, 1169 (9th Cir. 2015),
11 citing Wiggins, 539 U.S. at 535-36. Here, Petitioner fails to establish a reasonable
12 probability of either a different decision by counsel or a different outcome at trial. Again,
13 the evidence of third party culpability Petitioner offers goes only to motive and
14 opportunity, and is inadmissible under California law, while Petitioner's arguments about
15 Mary Magoon's involvement in her husband's drug smuggling activities and her
16 participation that evening are based on speculation. Even if trial counsel had obtained of
17 all of the information presented here, Petitioner fails to demonstrate any reasonable
18 probability that counsel would have chosen another defense over the one presented at trial,
19 nor any reasonable probability that the outcome of the trial would have differed.

20 Petitioner also fails to show prejudice stemming from the absence of expert
21 testimony challenging the physical evidence. Petitioner argues that:

22 It is highly relevant to prejudice that trial counsel failed to investigate the
23 defense that petitioner had laid out for them at the beginning of the case, and
24 to which he adhered throughout the course of the trial, i.e., that he and
25 Alvarado arrived at the Magoon residence to find the bloody scene and the
26 victims, after which they left with marijuana from the garage. The testimony
27 of a blood spatter expert would have provided very strong corroboration of
petitioner's defense, and would have undermined what the prosecutor claimed
as highly inculpatory evidence.

28 ///

1 (Reply at 97.) Petitioner criticizes the collection and analysis of the ballistics evidence,
2 hair samples, and blood evidence, noting the presence of numerous bullet casings in the
3 home that were not matched to any weapons recovered from the scene or the car,
4 questioning how both Daniel Magoon and Mary Magoon had hair in their hands matching
5 J. Magoon, and positing that the lack of significant injury to Petitioner coupled with the
6 delayed discovery of blood matching Petitioner on the weapons at the scene raised a
7 possibility that the stains were the result of contamination. However, the state record is
8 bereft of evidence outlining the contents of prospective testimony by a blood spatter expert,
9 ballistics expert, or other relevant expert¹⁹ on these matters, or detailing how any such
10 testimony could have made a difference at Petitioner’s trial. These contentions, on their
11 own, are insufficient to demonstrate prejudice. See Grisby v. Blodgett, 130 F.3d 365, 373
12 (9th Cir. 1997) (“Speculation about what an expert could have said is not enough to
13 establish prejudice.”)

14 Petitioner’s prejudice argument also remains unpersuasive given the substantial
15 evidence supporting the first degree murder verdict, particularly with respect to Mary
16

18 ¹⁹ In support of the first state habeas petition, Petitioner offers a declaration by
19 forensic scientist Laurie Kaminsky, who reviewed the prosecution’s hair examination
20 report. (Lodgment No. 117, Ex. 118.) Kaminsky’s declaration is limited to the analyst’s
21 discussion of hairs found in Mary Magoon’s right hand, labeled #44, that were similar in
22 hue, but different in pigmentation size and distribution, to that of Daniel Magoon, and
23 criticizes the analyst’s opinion that the evidence “leads to no conclusion” as to whether the
24 hairs originated from Daniel Magoon. (Id.) Kaminsky states that given the differences
25 noted, “I would exclude the hair standard from Daniel Magoon, Sr. as a possible source for
26 the evidence hair.” (Id.) However, Kaminsky qualifies her conclusion by noting that: “It
27 should be noted that I have not personally examined the hairs referenced in this declaration
28 nor have I examined [the analyst’s] examination bench notes.” (Id.) Upon reviewing the
trial record, the analyst testified that with respect to #44, “I could not determine from whom
this particular strand of hair originated.” (RT 3359.) Given the lack of any trial testimony
including Daniel Magoon as a possible source of this hair, Petitioner fails to demonstrate
that this expert’s prospective testimony was contrary to the trial testimony, much less show
that it would have made any difference to the outcome of the trial.

1 Magoon, as well as the special circumstances. Mary Magoon was found several rooms
2 away from any weapon and was murdered in her pajamas, a pacifier in her hand and a baby
3 blanket at her feet, and the evidence supported a conclusion that her three year old son was
4 likely near her at the time of his wounding and possibly her death. Blood consistent with
5 Petitioner and Mary Magoon was found on different areas of weapons connected to the
6 crimes, and blood consistent with the victims' blood were found on Petitioner's pants.
7 Petitioner and Alvarado were stopped by police about an hour or two after the murders at
8 a location 15 minutes away from the Magoon home, with frozen marijuana in their trunk,
9 a Helwan pistol in the car, and 9mm magazine and other bullets in the car. Meanwhile,
10 9mm casings were found at the crime scene, in addition to an empty box for a Helwan,
11 remnants of frozen marijuana inside and outside the freezer, and Alvarado's fingerprints
12 on a cup in the kitchen, while Daniel Magoon's prints were found on tape used to package
13 the marijuana. On this record, Petitioner fails to demonstrate any reasonable probability
14 that the outcome of the trial proceedings would have differed if not for counsels' alleged
15 errors in investigating and presenting the defense at trial. See Strickland, 466 U.S. at 694;
16 Richter, 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just
17 conceivable.") Petitioner is not entitled to habeas relief on Claim 22. Because Petitioner
18 fails to satisfy section 2254, an evidentiary hearing is not warranted on Claim 22. See
19 Sully, 725 F.3d at 1075 ("[A]n evidentiary hearing is pointless once the district court has
20 determined that § 2254(d) precludes habeas relief.")

21 5. **Claim 23**

22 Petitioner contends that he was deprived of the effective assistance of counsel at the
23 penalty phase, as the defense "presented extremely cursory testimony at the penalty trial,
24 consisting of relatives who testified that they loved petitioner and would be saddened if he
25 were executed," yet failed to investigate or present information about Petitioner's
26 background, upbringing, and social history, including his difficulties and
27 accomplishments, as evidence in mitigation. (SAP at 117.) Specifically, Petitioner
28 contends that trial counsel failed to investigate and present evidence that: (1) Petitioner

1 had undergone torture at the hands of Mexican police; (2) although Petitioner had spent
2 time in Mexican prisons for involvement in drug related activities, there was a lack of
3 violence; (3) Petitioner had a long-standing struggle with drug abuse, and counsel failed to
4 procure a mental health expert to investigate the reasons for his drug use; and (4)
5 Petitioner's childhood was difficult and marked by physical abuse and indications of
6 childhood disabilities. (Id. at 118.) Petitioner requests an evidentiary hearing on this claim.
7 (Id. at 55.)

8 Petitioner raised this claim as Claim XIII in the first state habeas petition, and the
9 California Supreme Court rejected it on the merits without a statement of reasoning. (See
10 Lodgment Nos. 106, 118.)

11 **A. Penalty Phase Presentation**

12 Prior to the commencement of the penalty phase presentation to the jury, counsel
13 litigated the prosecutor's attempt to introduce a prior conviction in Mexico as evidence in
14 aggravation under Cal. Penal Code section 190.3(c); after hearing testimony and citing
15 concerns about the presumption of guilt, absence of jury trial, and allegations of torture to
16 obtain confessions in that jurisdiction, the trial court excluded the conviction. (RT 4510-
17 11.) After this ruling, the prosecution brought up the possibility of instead introducing
18 evidence concerning Petitioner's prior criminal activity under Cal. Penal Code section
19 190.3(b) and exploring the issue of prior criminal activity through cross-examination of
20 any mental health experts or character witnesses called to testify on Petitioner's behalf.
21 (RT 4511-12.) In response, defense counsel stated:

22 Your Honor, at this point I would like to rather clearly and candidly
23 indicate that with the ruling the court made, that it is not our intention right
24 now to call a psychiatrist or a psychologist, so I don't need to address what
would be used there.

25 And amongst other witnesses, just specifically jumping into it, were we
26 to call other family members, for instance, it would not be as character
27 witnesses, it would be to the limited extent, for instance, to ask would the
death of your brother, father, or husband be a great loss to you?

1 Which I suggest to the court will be so definitive that it will not arguably
2 come near opening up character -- by being a character affirmation or
3 testimony as to good character, and it will not invite or allow cross-
4 examination including bad character, including this prior conviction.

5 (RT 4512-13.) The trial court noted that because the prior conviction was excluded, “the
6 prosecution could not impeach the defendant via have you heard type questions framed in
7 terms of a conviction of the defendant,” if the defense called character witnesses, but
8 acknowledged that “the underlying facts may well be the subject of a proper have you heard
9 type of question.” (RT 4513.) The prosecution stated that if such character witnesses were
10 called, he would seek to ask about Petitioner’s involvement in a 1983 robbery, a 1992
jewelry theft, a 1989 check forgery, and trafficking in narcotics in 1977. (RT 4518.)

11 Correctional consultant James Park, who worked on death row at San Quentin State
12 Prison, testified about the four-tier prison classification system, of which Level IV was the
13 highest security. (RT 4782-86.) Park stated that an individual sentenced to life without
14 parole would be placed in a Level IV institution, of which there are five in California, and
15 showed photos of the cells, security measures, and discussed prison conditions. (RT 4786-
16 98.) Park acknowledged that even in a Level IV prison, inmates could work on
17 maintenance or industry if offered at that institution, and that the institutions had libraries,
18 a group TV room, exercise yards, and the inmates could have family visits. (RT 4799-
19 4806.)

20 Carrie Baker, who lived in Jamul near the Magoon home at the time of the murders,
21 estimated she came home from work that evening at 2:00 a.m., and heard gunshots at about
22 2:45 a.m.²⁰ (RT 4807.) She was reading the paper with the windows open and heard a
23 muffled gunshot, shortly thereafter heard three additional gunshots, and after another space
24 of time, heard two more gunshots. (RT 4808.) Baker stated that the shots startled her dog,
25 who barked his “people bark,” and while she was able to quiet him down by 3:30 a.m. to

27 ²⁰ As the California Supreme Court noted, the gunshots Baker heard “would have
28 been after the time defendants had been arrested.” Hoyos, 41 Cal. 4th at 889.

1 go to sleep, she was continually woken until about 5:15 a.m. (RT 4808-09.) She was then
2 woken by sirens at around 7:30 or 8 in the morning, and thereafter learned of the murders.
3 (RT 4809.) She noted in her diary that she heard gunshots before she went to bed on May
4 26 to 27, 1992. (RT 4810-11.) Baker explained that her entry would have been made for
5 Tuesday night May 26, even though it was actually Wednesday morning, because she gets
6 home from work late on Tuesday nights. (RT 4811-12.) Baker thought, based on her dog's
7 barking, that someone was in her yard that evening. (RT 4815.)

8 Jaime Armando Hoyos Alvarado, Petitioner's son, testified that he loved his father
9 and would feel "badly" if he could no longer see him. (RT 4819-20.) Petitioner's son
10 Jesus Ivan Hoyos Alvarado also stated that he loved his father and would feel badly and
11 miss him if he could no longer see him. (RT 4820-21.) Myrna Myela Hoyos Alvarado,
12 Petitioner's daughter, testified that she loved her father. (RT 4821.) Myrna Myela
13 Alvarado de Picos, Petitioner's wife, testified that the prior three witnesses were her
14 children with Petitioner, that today was Petitioner's birthday, that she would feel extremely
15 sad if he were put to death, and that she was currently raising the children on her own. (RT
16 4822-23.)

17 Jesus Antonio Hoyos Jaime, Petitioner's older brother, stated that he loved his
18 brother a lot, missed him a lot, and would feel sad to lose a loved one. (RT 4823-24.)
19 Ricardo Hoyos Jaime, Petitioner's younger brother, testified that he loved and missed his
20 brother and would be greatly affected were Petitioner put to death. (RT 4824-25.) Eusebio
21 Hoyos, Petitioner's younger brother, stated that he loved his brother and it would be very
22 painful to him if Petitioner were put to death. (RT 4825-26.) Eusebio stated that he lived
23 in Tecate, as did their entire family, and explained that their mother and father could not
24 come to court today because "they are a little bit ill, in bad health." (RT 4826.) Maria
25 Elena Hoyos Hernandez, Petitioner's sister, also stated that she missed her brother and
26 would feel very sad if he were put to death. (RT 4827-28.)

27 The prosecution waived opening statement and declined to present evidence at the
28 penalty phase, offering argument only in closing. (RT 4779, 4782, 4828, 4840-58.)

1 **B. Background Information Submitted During Post-Conviction**
2 **Proceedings**²¹

3 Petitioner submitted to the state court declarations from numerous family members,
4 including several declarations from siblings who testified at trial, as well as declarations
5 from several family members who did not testify at trial, including other siblings and his
6 mother. Petitioner also presented school records, a declaration from his family physician
7 about his history of drug addiction, and his own declaration. As set forth below, these
8 declarations discuss Petitioner's background, including his upbringing, family and social
9 history, and particularly physical abuse by his father, Petitioner's personality and
10 rebelliousness, his later drug addiction and accidents suffered by Petitioner in childhood
11 and as an adult. Petitioner also presented documents and information about Mexican prison
12 conditions and torture in those institutions, and a declaration from a prison worker who
13 knew Petitioner. Finally, Petitioner presented an evaluation from a clinical psychologist
14 who examined him prior to the trial proceedings, and a declaration from a clinical
15 psychologist specializing in neuropsychology who examined Petitioner during post-
16 conviction proceedings.

17 The Hoyos family owned and operated a ranch in Tecate, Mexico, and every family
18 member worked to run the ranch. The Hoyos children all worked on the ranch every day
19 both before and after school, starting at a young age and leaving them with little time for
20 leisure. (Lodgment No. 114, Ex. 80 at 1, Ex. 82 at 1, Ex. 83 at 1, Ex. 111 at 1.) Petitioner
21 states that he started working on the ranch as "a little boy," and that: "I was the best of all
22 my siblings at working with horses so over time I became almost exclusively in charge of
23 the task of handling the horses." (Lodgment No. 115, Ex. 84A at 1.) Petitioner's brother

25 ²¹ Several documents in the state record, including declarations signed by Petitioner's
26 mother, siblings, girlfriend, family doctor, torture expert Alfaro, and Petitioner himself, are
27 in Spanish, and are accompanied by unsigned English translations. (See e.g. Lodgment
28 Nos. 114, 115.) Any references or citations to the declarations are to the English versions
of those documents.

1 Adolfo adds that: “Jaime was very good at working with horses. He was the one mostly in
2 charge of taming the wild horses because he was so skilled at this and he was better at this
3 than the rest of us.” (Lodgment No. 114, Ex. 112 at 1.) Petitioner’s brothers Eusebio and
4 Ricardo each note that Petitioner had a lot of energy and enjoyed working with the cattle
5 and wild horses, and was thus well-suited for his work on the ranch, with Ricardo adding
6 that: “Part of this job means getting thrown off horses and pounded around a lot.” (Id., Ex.
7 82 at 1, Ex. 111 at 2.)

8 Petitioner’s grandparents lived nearby and his two grandmothers treated the children
9 very differently, with Petitioner stating that his maternal grandmother “was extremely
10 affectionate and loving with all her grandchildren, including me,” while his paternal
11 grandmother “was a cold, angry, grumpy woman who picked favorite grandchildren.”
12 (Lodgment No. 115, Ex. 84A at 3.) Petitioner was not among his paternal grandmother
13 favorites, and Petitioner said: “I felt she actually despised me while she just ignored” two
14 of his brothers. (Id.) Petitioner notes that his grandmother bought presents for some
15 grandchildren and nothing for others, that she “was friendlier and more patient” with some
16 of the children while “she just yelled at and scolded” him and a few of his other siblings.
17 (Id. at 4.) Petitioner’s mother Leticia confirms this disparate treatment, stating that her
18 mother-in-law “rejected” and “disliked” Petitioner and reasoning that “[m]aybe it was
19 because Jaime was the most restless and hyper of the grandchildren.” (Lodgment No. 114,
20 Ex. 79 at 13.)

21 Petitioner’s mother Leticia states that Jesus, her husband and father to their children,
22 “was an alcoholic for many years” when the children were young and “drank almost
23 everyday.” (Id. at 5.) Leticia states that Jesus “was hard on the children,” and “hit them
24 just because he was angry,” and that when he drank “he would act even more ill-tempered
25 than normal.” (Id. at 4-5.) Leticia explains that Jesus had a complicated relationship with
26 his own parents, who had hit him. (Id. at 7.) Leticia describes Jesus as a “disciplinarian”
27 who “was too strict with and hard on his children,” states that she “used to cry when Jesus
28 hit the children” and “had to sneak in fun for my children and do it behind my husband’s

1 back.” (Id. at 10.)

2 Petitioner states that: “My father and his mother had the same ill-tempered
3 character,” as they were “both demanding,” and “both angered easily and seemed unhappy
4 or grumpy.” (Lodgment No. 115, Ex. 84A at 5.) Petitioner adds that: “My father’s
5 temperament was even gruffer when he drank alcohol. As a kid, I used to be afraid of my
6 father and especially when he was drunk because this meant he might hit me for no reason.
7 Other times, he hit me and my siblings with a belt when he got angry or to discipline us.”
8 (Id.) Petitioner describes his relationship with his father as “intense” and states that: “We
9 communicated with each other as passionately as we butted heads with each other.” (Id.
10 at 3.) Petitioner also felt that his brothers Ricardo and Jesus were jealous over the bond he
11 had with their father, stating that: “Even as adults, they used to say our father treated me
12 better than them.” (Id.) Maria Elena notes that: “My father hit all his children equally for
13 what he considered misbehaving. However, Jaime was hit the most because he was the
14 most restless and disobedient child.” (Lodgment No. 114, Ex. 83 at 2.) Maria Elena adds
15 that their father was “ill-tempered and ornery,” was “unpredictable” and “would also get
16 angry for no reason,” and that he “also beat the animals when he was irritable and angry.”
17 (Id. at 2-3.)

18 Petitioner’s family also provided additional information about Petitioner’s behavior
19 during childhood and adolescence. Leticia states that Petitioner cried more than her other
20 children, had mood swings and “could go from being calm in one moment to becoming
21 restless and anxious or hyper in the next moment, or vice versa, with no apparent trigger.”
22 (Id., Ex. 79 at 17-18.) Leticia states that: “As an adult, Jaime has confessed to me that he
23 felt depression, desperation, anxiety, and restlessness throughout his childhood and
24 adolescence.” (Id. at 17.) Petitioner was hyperactive in his classes at school, became
25 “more rebellious and temperamental” as he got older, and did not perform well in school,
26 as he “was more focused on socializing than on his academics.” (Id. at 18-20.) Leticia
27 said that Petitioner “was a moody child and he was a temperamental teenager.” (Id. at 21.)
28 As Petitioner got older, “it was obvious his friends were drug addicts and/or drug dealers,”

1 and while many old friends expressed their concerns about Petitioner's drug use and new
2 friends, Petitioner denied bad behavior. (Id. at 22.) After one argument with his parents
3 about his long hair and friends, Leticia recalls that Petitioner went to his room, where a
4 pistol was kept under the bed, slammed the door and: "The next thing I heard was Jaime
5 firing the pistol. I ran into the bedroom and saw that Jaime had shot himself in the arm."
6 (Id. at 25.) Leticia states that Petitioner "definitely overreacted" to the argument and she
7 suspected he was trying to scare her and his father, or that drugs were a factor in his actions.
8 (Id.)

9 Petitioner's oldest brother Jesus Jr., similarly states that Petitioner "was never very
10 good in school, but none of us were very school smart except my brother Eusebio and my
11 sister Maria Elena." (Id., Ex. 80 at 1.) Jesus states that Petitioner was "naughtier and more
12 hyper" than the other children and that "[i]t seemed like it was hard for Jaime to stay still."
13 (Id.) Jesus states that: "At first, Jaime's friends were good kids but as Jaime got older his
14 friends started to come from a bad crowd." (Id. at 2.) Petitioner's brother Eusebio adds
15 that he recalled his brother was "too playful" in school and it landed him in trouble, noting
16 that in middle school, Petitioner "punctured the tires of a teacher and got suspended and
17 after this he stopped going to school." (Id., Ex. 82 at 2.) Eusebio, like Jesus, notes that
18 Petitioner had good friends when he was younger, yet "as Jaime got older, he started having
19 friends who were bad kids and who were a bad influence on Jaime." (Id. at 3.) His brother
20 Ricardo recalls that: "Jaime was definitely the most hyper one out of all his siblings. In
21 comparison, he had more energy and it was harder for him to stay still." (Id., Ex. 111 at
22 2.) He adds that: "As a kid, Jaime was more disobedient than the rest of us, but his
23 disobedience was nothing serious," and that "Jaime got scolded more than the rest of us
24 because of his disobedience." (Id. at 2-3.) Petitioner's brother Adolfo also recalls that
25 Petitioner had a number of friends, but also noted that the type of people Petitioner
26 associated with changed as Petitioner aged, stating that: "as he got older his friends started
27 to be the kind of people who were a bad influence on him. I could tell by the way these
28 friends dressed in a fancy manner and by the luxurious cars they drove that they were

1 probably into drug dealing.” (Id., Ex. 112 at 2.) Petitioner also includes school records
2 from Tecate, reflecting that he failed the subjects of mathematics and Spanish in high
3 school while achieving the minimum required grades in other subjects, was suspended from
4 school at one point in 1973, and was the subject of a behavior report for repeatedly arriving
5 late to school in 1979. (Lodgment No. 115, Ex. 85A.)

6 Petitioner also suffered several accidents in his youth and adulthood. Leticia
7 recounts that Petitioner lost his right thumb in an accident at age 15. (Lodgment No. 114,
8 Ex. 79 at 23.) She also states that he fell off a horse at 15 or 16 and returned home bruised
9 and scratched after rolling down a hill on the horse and losing consciousness, stating:
10 “Jaime told us the horse fell, he was asleep for a while on the ground, and when he woke
11 up, the horse was dead.” (Id. at 23-24.) She states that Petitioner later got a motorcycle,
12 then sold it after having an accident with it. (Id.) Leticia also recounts that Petitioner was
13 involved in a car accident not long prior to the events in the case, when he and a cousin
14 “were driving in a small Volkswagen bug that flipped over and fell into a ravine.” (Id. at
15 25.) The car they were in was totaled and his cousin broke his collarbone, while Petitioner
16 did not sustain any visible injuries. (Id.)

17 Petitioner’s brothers also noted the injuries from his work with horses, with Jesus Jr.
18 stating that: “Jaime did get injured and knocked around a lot because it was tough work
19 trying to tame wild horses.” (Id., Ex. 80 at 2.) Meanwhile, Adolfo states that Petitioner
20 “got thrown off horses and fell a lot,” noting that especially at the beginning of training the
21 horses, “the horses get easily spooked.” (Id., Ex. 112 at 1-2.) Adolfo states that: “Even
22 though Jaime stopped living on the ranch, he returned and he always loved being with the
23 horses. I remember seeing Jaime take a few hard falls with the last horse he was taming.
24 This was just a few months before he was arrested in San Diego.” (Id. at 2.) Eusebio states
25 that: “About 15 or 20 years ago Jaime needed to be hospitalized in Tecate for a week or so
26 after being involved in an accident with a horse. I didn’t see the accident but I remember
27 seeing Jaime in the hospital,” and adds that: “Jaime was always the most daring of all his
28 brothers. That is why he loved cars and motorcycles and horses. He got hurt a lot but he

1 wasn't scared of anything." (Id., Ex. 82 at 4.)

2 Several family members, as well as Petitioner and the family's physician, discuss
3 Petitioner's lengthy history of drug and alcohol use and abuse. Petitioner's mother states
4 that: "Jaime's father and I knew Jaime was into drugs since he was a teenager," but
5 admitted that the family did not confront the matter until he was in his early thirties, about
6 a year prior to his arrest in this case. (Id., Ex. 79 at 29.) She states that Petitioner "probably
7 started using drugs even earlier than I thought he did. Perhaps this accounted for some of
8 his wild behavior as a teenager." (Id. at 21.) During treatment by their family doctor,
9 Petitioner spent time at the family's home in Tecate and it "was the first time he had ever
10 told us in any detail about the drug addiction we had long suspected." (Id. at 29.) Leticia
11 states that after treatment, Petitioner started to use drugs again and then went to the United
12 States. (Id. at 30.) Dr. Jaime Chavez Jiminez, the Hoyos' family physician, treated
13 Petitioner for his drug addiction upon Petitioner's request, and states that: "My method of
14 treatment was to provide a substantial intake of vitamins and healthy food, but not other
15 drugs of any kind - no tranquilizers, or anything that would replicate in any way the effect
16 of drugs." (Lodgment No. 115, Ex. 91A at 2.) He states that Petitioner had "severe, but
17 typical" withdrawal symptoms, complained of pain and aches, heard and saw things that
18 did not exist, expressed sensitivity to sound and light, experienced paranoia, and expressed
19 wanting to commit suicide. (Id.)

20 Jesus Jr. states that he thought his brother started drinking at age 16 or 17, while
21 sister Maria Elena suspected him of both dealing drugs and guns throughout his twenties.
22 (Lodgment No. 114, Ex. 80 at 3, Ex. 83 at 4.) Ricardo recalls that his brother drank and
23 smoked during parties and other events as a teenager, in contrast to Ricardo, who waited
24 to drink until 18, which was approved of by their father. (Id., Ex. 111 at 3.) Petitioner
25 states that: "I started smoking marijuana when I was about 12 or 13 years old. Over the
26 years, my drug use escalated with the use of stronger drugs such as cocaine, heroin, and
27 pharmaceutical drugs and I became a serious drug addict. If I was out on the street today
28 I feel I would still have a drug addiction and substance abuse problem without serious

1 emotional and medical therapy.” (Lodgment No. 115, Ex 84A at 5.) He states that: “I
2 never really liked marijuana. But by the time I was 14 and 15 years old, I was smoking
3 marijuana daily and often consuming several drinks of alcohol as well.” (Id.) He recalls
4 that: “I started using cocaine sporadically when I was about 16 years old and by the time I
5 was 20, I used cocaine daily and was addicted. On an average day, I snorted about three
6 or four grams and on an extreme day, I snorted up to a half an ounce of cocaine.” (Id. at
7 6.) Petitioner enjoyed the high, as it “altered my mood and it made me forget about any
8 anger or sadness,” but acknowledged cocaine also made him “feel more aggressive” and
9 “act hysterical and paranoid.” (Id.) He states that: “I got into heroin as a way to even out
10 the extreme highs I got from cocaine,” and also used pharmaceuticals “when I realized I
11 was using too much of the cocaine or heroin I was supposed to be selling or storing. For a
12 time I just used pills, but then I started mixing all the drugs.” (Id.) He states that: “By age
13 23 or 24, I was addicted to cocaine, heroin, and uppers and downers. I used one or all of
14 these drugs every day,” and notes that he first used hard drugs in La Mesa prison in Tijuana.
15 (Id. at 6-7.) Petitioner lived a “double life” as a teenager and in his twenties due to his drug
16 use, including multiple periods where he quit and then started using again. (Id. at 7-8.)
17 Petitioner also states that: “My trial attorneys knew nothing about my history of drug
18 addiction,” and because he went through withdrawal at the outset of the case, “[i]t took me
19 about three months until I was really able to concentrate on the proceedings at hand. My
20 attorneys had no idea I was suffering so much.” (Id. at 9.)

21 Several of Petitioner’s family members also mention that his second wife’s family
22 was known to be heavily involved in drug trafficking. (See e.g. Lodgment No. 114, Ex.
23 79 at 28, Ex. 83 at 4.) Petitioner’s brother Adolfo notes that: “When Jaime married his
24 second wife Mayela Alvarado, Jaime lived in town with her and her family. Mayela’s
25 father and brothers had a reputation for being involved in drug dealing so I am sure the
26 Alvarado’s [sic] were another bad influence on Jaime.” (Id., Ex. 112 at 3.) Maribel Lopez,
27 who was Petitioner’s girlfriend at the time of the murder, states that Petitioner’s wife
28 Mayela “was stalking me and terrorizing me” prior to trial, and states that she stopped

1 visiting Petitioner in jail because “Mayela was making my life too difficult.” (Id., Ex. 64
2 at 4-5.)

3 Petitioner also experienced several incidents of torture, including multiple instances
4 that occurred during incarceration in Mexican jails and institutions. Petitioner states that
5 he was first kidnapped and tortured at age 17 by coworkers who thought he stole, but that
6 “[a]fter this, my aggressors were always federal police.” (Lodgment No. 115, Ex. 84A at
7 9-10.) Petitioner estimates that between 1977 and 1992, he was tortured by police about
8 ten separate times, mostly during interrogations sessions, explaining that torture by the
9 police was “always part psychological and part physical,” and that he later experienced
10 “paranoia and fear” and “flashbacks.” (Id. at 10-11.) Petitioner states that: “Most of the
11 times I was beaten and tortured by federal police occurred during police detentions. The
12 main motive of police torture was to get money or information out of me.” (Id. at 12.) He
13 also explains that the torture was primarily related to drug crimes, in that: “I was never
14 tortured or beaten up when I was detained outside prison and didn’t have drugs in my
15 possession.” (Id. at 12-13.) He details various methods of torture he experienced,
16 including electrocution, burning, beating, vinegar in his nose, and being thrown in the
17 ocean in a sack, among others, and noted that he sometimes blacked out from the torture.
18 (Id. at 11-12, 14.) Leticia, who visited Petitioner every few weeks during his incarceration
19 in Mexico, states that he “was severely beaten and tortured before he was arrested and sent
20 to a Mexican jail.” (Lodgment No. 114, Ex. 79 at 28.) She states that: “They did horrible
21 things to Jaime such as pouring carbonated water into his nose and they beat him so badly,
22 they broke his ribs.” (Id.) Petitioner’s brother Eusebio recalls that: “About 20 years ago,
23 I saw Jaime in a prison or jail clinic in Ensenada. He had been recently arrested. The
24 police had severely beaten him up and tortured [sic] and he was still in their custody. Police
25 commonly beat up and torture men they arrest, but Jaime got it worse than normal because
26 he needed to be hospitalized. It seemed like Jaime had been beaten up about a week earlier
27 and he was in such bad shape that it seemed like he needed about three more weeks to fully
28 recover. [¶] Jaime was bruised and swollen all over his face and body. Everything hurt and

1 he was unable to talk. He just moaned in pain. He was lying in a bed to which he was
2 handcuffed and there was a police officer watching over him. We weren't able to have a
3 conversation because he was too badly beaten up. But I was able to see that Jaime was
4 furious at the police. I was pretty worried about Jaime." (Id., Ex. 82 at 4.) Ricardo recounts
5 that: "I was probably about 27 years old when I visited Jaime in jail in Ensenada. Jaime
6 told me he had been beaten up by police but he didn't give me a lot of details. I could see
7 that his back and his bottom were all bruised and he had cigarette burns on his back." (Id.,
8 Ex. 111 at 4.) Social anthropologist Victor Clark Alfaro, who has written and published
9 case studies on the use of torture in Baja California, and who consulted with the defense
10 before trial but was not called to testify, states that: "I have reviewed Jaime Hoyos's
11 account of how he was tortured, and when. Of course, I was not there, and cannot provide
12 direct testimony as to its veracity. However, I can say with confidence that not only is
13 what he says plausible, but it is far more likely than not to be true, because that was
14 precisely the way those types of cases were investigated at the times and places of his
15 arrests." (Lodgment No. 115, Ex. 86A at 4.)

16 Mary Antonia Brenner, who has lived in a cell in the La Mesa Prison as a religious
17 worker since 1977, knew Petitioner during his incarceration. (Lodgment No. 113, Ex. 90
18 at 1-4.) Brenner states that Petitioner was "courteous" and "shy" and was not violent like
19 some of the men in the institution. (Id. at 4.) She states that Petitioner carried a photo of
20 his newborn baby, and found Petitioner "likeable, and even boyish, as he seemed younger
21 than his years." (Id.) Brenner states that Petitioner was "in no sense a shot-caller" in the
22 prison, but instead "was happy to shine the shoes, so to speak of the head honchos in the
23 drug-trafficking world. He would have been honor-bound to follow their directives, but he
24 did not have either the type of character or the ability to initiate something malicious and
25 complicated when I knew him." (Id.) Brenner states that had defense counsel contacted
26 her, she would have appeared in court on Petitioner's behalf. (Id. at 4-5.)

27 Dr. Jiminez, the Hoyos family physician, who first met Petitioner as a teenager, also
28 noted several behavioral matters, and states that Petitioner "had some kind of internal

1 struggle," and would swing between expressing affection and fighting and yelling, or
2 would get along with people, shortly followed by screaming and saying ugly things to his
3 family. (Lodgment No. 115, Ex. 91A at 1.) He opines that Petitioner suffered from
4 depression and "exhibited symptoms of bipolar disorder." (Id. at 4.) He states that: "This
5 [post-conviction proceeding] is the first time I have talked to the defense for Mr. Hoyos. I
6 would have been willing to speak for Jaime Hoyos' defense at the time of his trial and his
7 family would have contacted me." (Id. at 4.)

8 Records reflect that defense counsel contacted clinical psychologist Thomas
9 MacSpeiden, Ph.D., to evaluate Petitioner and submit a report. (Lodgment No. 113, Ex.
10 93.) Dr. MacSpeiden related background and offense information, including Petitioner's
11 self-report that his medical history was "uneventful" aside from the accident resulting in
12 the amputation of his thumb and that he misused heroin in his early twenties on only a few
13 occasions. (Id. at 4, 7.) Dr. MacSpeiden administered a number of tests, including the
14 WAIS-R, Rorschach, TAT, Spanish versions of the MCMI-II and MMPI-2, and the Bender
15 Visual Motor Gestalt Test. (Id. at 15.) Dr. MacSpeiden concluded that Petitioner's
16 intellectual function was in the "low average range," and that "[t]he structure of Mr. Hoyos'
17 personality is nonpsychotic." (Id. at 22.) Dr. MacSpeiden's analysis discussed the crimes
18 themselves at length as well as offering his opinions about Petitioner's participation.
19 Indeed, Dr. MacSpeiden opined that based on the results of his psychological evaluation,
20 it "appears probable" that Petitioner accompanied his brother-in-law to the victims' home
21 that evening to collect a debt, carried a weapon for intimidation, and that his brother-in-
22 law was likely the first, and possibly the only, one to fire a weapon. (Id. at 23.) He stated
23 that Petitioner was reported to be tearful over the injury to J. Magoon, which "suggests a
24 degree of empathy -- or at least sympathy -- that would make killing another person
25 difficult," but also stated that Petitioner's "need to appear macho would preclude his
26 stopping another person from performing such an act." (Id.) Dr. MacSpeiden's diagnostic
27 impressions included: "Opioid Dependence, in Remission" as well as "Dysthymia, Primary
28 Type, Early Onset," and "Personality Disorder Not Otherwise Specified [with dependent

1 and self-defeating traits].” (Id. at 24.) As discussed below, the defense did not call him to
2 testify at either the guilt or penalty phases of trial.

3 During post-conviction proceedings, counsel retained clinical psychologist Ricardo
4 Weinstein, Ph.D, who specializes in neuropsychology, to evaluate Petitioner’s cognitive
5 functioning. After an evaluation, including numerous tests not administered by Dr.
6 MacSpeiden, and reviewing the prior evaluation, Dr. Weinstein concluded that “Mr. Hoyos
7 is functioning at the mental retardation level of intelligence.” (Id., Ex. 99 at 3.) Dr.
8 Weinstein states that: “In reviewing Dr. MacSpeiden’s report it became evident that he
9 failed to identify the very significant brain dysfunction that Mr. Hoyos has suffered over
10 the course of his childhood, adolescence and adulthood.” (Id.) Dr. Weinstein notes
11 Petitioner’s “history of multiple brain insults dating back to his childhood” in addition to
12 “many instances of loss of consciousness,” and “a long history of severe drug addiction.”
13 (Id.) Dr. Weinstein faults Dr. MacSpeiden both for failing to note that history and for using
14 an interpreter to assist in conducting the evaluation rather than having tests conducted by
15 a Spanish-speaking neuropsychologist. (Id. at 3-4.) Dr. Weinstein states that: “It is my
16 opinion with a high degree of scientific certainty that Mr. Hoyos suffers from significant
17 brain dysfunction and possibly from mental retardation. These are definitively mitigation
18 factors in a death penalty sentencing trial.” (Id. at 4.)

19 **C. Discussion**

20 Under Strickland, “a defendant must show both deficient performance and prejudice
21 in order to prove that he has received ineffective assistance of counsel.” Mirzayance, 556
22 U.S. at 122, citing Strickland, 466 U.S. at 687. “Surmounting Strickland’s high bar is never
23 an easy task.” Padilla, 559 U.S. at 371. Because the Court is reviewing this claim under
24 section 2254(d), the “state court must be granted a deference and latitude that are not in
25 operation when the case involves review under the Strickland standard itself.” Richter,
26 562 U.S. at 101. “When § 2254(d) applies, the question is not whether counsel’s actions
27 were reasonable. The question is whether there is any reasonable argument that counsel
28 satisfied Strickland’s deferential standard.” Id. at 105.

1 Emphasizing the importance of discovering and presenting a penalty phase jury with
2 all of the “relevant” and “available” evidence in mitigation, the Ninth Circuit has stated
3 that ““trial counsel must inquire into a defendant’s social background, family abuse, mental
4 impairment, physical health history, and substance abuse history; obtain and examine
5 mental and physical health records, school records, and criminal records; consult with
6 appropriate medical experts; and pursue relevant leads.”” Wharton v. Chappell, 765 F.3d
7 953, 970 (9th Cir. 2014), quoting Hamilton v. Ayers, 583 F.3d 1100, 1113 (9th Cir. 2009),
8 Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). In Strickland, the Supreme Court
9 instructed that “counsel has a duty to make reasonable investigations or to make a
10 reasonable decision that makes particular investigations unnecessary. In any
11 ineffectiveness case, a particular decision not to investigate must be directly assessed for
12 reasonableness in all the circumstances, applying a heavy measure of deference to
13 counsel’s judgments.” Strickland, 466 U.S. at 691; see also Wiggins, 539 U.S. at 523 (“In
14 assessing counsel’s investigation, we must conduct an objective review of their
15 performance, measured for ‘reasonableness under prevailing professional norms,’ which
16 includes a context-dependent consideration of the challenged conduct as seen ‘from
17 counsel’s perspective at the time.’”), quoting Strickland, 466 U.S. at 688-89 (internal
18 citation omitted).

19 Again, Petitioner faults counsel for failing to investigate and present evidence that
20 Petitioner was tortured by the Mexican police and in jail, failing to present evidence of
21 Petitioner’s prior incarcerations, and the lack of violence on Petitioner’s part, failing to
22 investigate and present evidence, such as a mental health expert, about Petitioner’s struggle
23 with drug abuse, and failing to investigate and present testimony by Petitioner’s family
24 members about his difficult childhood, including that he had been subjected to physical
25 discipline and potentially struggled with childhood disabilities.

26 After reviewing the record, it is apparent that Petitioner’s argument is premised more
27 upon a disagreement with the penalty phase strategy defense counsel pursued than on
28 whether the defense investigation and presentation was itself deficient or unreasonable.

1 While trial counsel admits conducting a “less than complete” investigation into Petitioner’s
2 background, the record shows that the defense made numerous efforts to gather information
3 about Petitioner’s family history, mental health, and criminal history, including that he had
4 been subjected to torture, prior to making a reasonable, tactical choice to employ a penalty
5 phase strategy that focused on sympathy and avoided character testimony in order to keep
6 evidence of Petitioner’s prior criminal activity from the jury. See Strickland, 466 U.S. at
7 690-91 (“[S]trategic choices made after thorough investigation of law and facts relevant to
8 plausible options are virtually unchallengeable; and strategic choices made after less than
9 complete investigation are reasonable precisely to the extent that reasonable professional
10 judgments support the limitations on investigation.”) That Petitioner now posits a different
11 strategy may have been more successful does not mean that the defense presented at trial
12 fell below constitutional guarantees. See Raley, 470 F.3d at 799 (“A disagreement with
13 counsel’s tactical decisions does not provide the basis for declaring that the representation
14 was constitutionally deficient.”), citing Mayo, 646 F.2d at 375.

15 Investigator Alicia Vicars, who was part of the trial defense team, characterizes the
16 penalty phase investigation as “very thin,” as well as “embarrassing and deficient,” and
17 states that it “was the sideshow in comparison to the guilt phase.” (Lodgment No. 110, Ex.
18 49 at 1-2.) Meanwhile, attorney Herrera states that the defense “did nothing to develop
19 Mr. Hoyos’ life story, and came to believe that we had nothing to present to the jury by
20 way of mitigating evidence.” (Id., Ex. 44 at 7-8.) Yet, available records show that
21 members of the defense team, including both investigators and attorneys, repeatedly visited
22 and interviewed Petitioner’s family members and friends in Tecate and elsewhere, in an
23 effort to obtain information on Petitioner’s background and upbringing. Herrera states that:
24 “I can not [sic] remember any efforts to gather school records or other documents about
25 Mr. Hoyos. I do not believe we ever did a social history about Mr. Hoyos, or any history
26 of his drug addictions, or any record of head injuries in childhood or adolescence.” (Id. at
27 6.) Vicars states that she attempted to go to Petitioner’s school, “but it was not open.” (Id.,
28 Ex. 49 at 2.) Moreover, contrary to the detailed information now provided by these same

1 family members, the information Petitioner's friends and family members provided prior
2 to trial failed to mention that Petitioner had any history of head injuries, of any significant
3 drug use or abuse, that he suffered any physical abuse, nor offered any indication that
4 Petitioner may have had childhood disabilities. Nor has Petitioner presented the Court with
5 any documentary evidence, such as medical reports or hospital records, concerning such
6 matters.

7 Public defender travel records show that investigators made numerous trips to Tecate
8 in March, May, July and September 1993 to visit and interview Petitioner's family
9 members in preparing for the penalty phase proceedings. (See Lodgment No. 113, Ex. 98.)
10 Investigator Vicars specifically recalls traveling to Tecate with another investigator to visit
11 and interview Petitioner's family members, and states that they "didn't find extreme
12 poverty, sexual or physical abuse. The family was intact. They grew up in a beautiful
13 location near Rancho la Puerta. At the time, it seemed to me he had a childhood any of us
14 would have loved to have had. We brought back what we had, and the lawyers basically
15 gave up, saying that we didn't have much." (Lodgment No. 110, Ex. 49 at 2.) Case
16 coordinator Bunny Amendola agrees, noting: "There was nothing usable for the penalty
17 phase in his background either. The family seemed fine," and that: "This case only had
18 drugs; Jaime seemed to just get involved in drugs." (Id., Ex. 48 at 4.) Trial counsel
19 similarly states that "[o]ur efforts to find evidence of dire poverty, sex abuse, or serious
20 physical abuse in Mr. Hoyos's past, led us nowhere." (Id., Ex. 44 at 7.)

21 Petitioner's sister Maria Elena, when interviewed in May 1993, told investigators
22 that Petitioner had many friends who visited the ranch and loved animals; she stated that
23 they had a "normal family growing up" and that the "family was always close." (Lodgment
24 No. 113, Ex. 95 at 1.) She said that her family "did not comment too much about Jaime's
25 problems" and that "she never saw Jaime being involved in drug use and said he never had
26 an alcohol problem." (Id. at 2.) Maria Elena told investigators that her brother worked at
27 the family ranch after his marriage, was loving towards children and would not hurt a child.
28 (Id.) An interview with Petitioner's brother Eusebio, conducted outside the South Bay jail

1 in January 1993, was slightly more detailed. (Id., Ex. 96.) Eusebio stated that their father
2 “was a strong disciplinarian and would scold them or spank them if they did not behave,”
3 and Petitioner “was always a little more mischievous and active” than the other siblings.
4 (Id. at 1.) Eusebio stated that their father drank when they were young, but “was never an
5 alcoholic,” and like Maria Elena, Eusebio stated that Petitioner liked animals, including
6 horses and dogs. (Id. at 1-2.) Eusebio told the investigators that “the first time Jaime got
7 into difficulties he was still very young. He had heard it was something over drugs and
8 says that maybe his parents discussed this problem with his older brothers.” (Id. at 2.)
9 Eusebio recalled finding out about Petitioner’s drug troubles when Petitioner was detained
10 in Tijuana, and said that “even though there was not a lot of money to give to Jaime he
11 never saw that he had a problem with drugs or alcohol.” (Id.) Eusebio also stated that
12 Petitioner was loving with his children, and he could not believe Petitioner could hurt a
13 child. (Id.) Augustin Eiraut, a friend of the Hoyos family who was interviewed in May
14 1993 in Tecate, stated that Petitioner worked with horses when he was younger and was
15 always willing to help out. (Id., Ex. 97.)

16 Vicars recalls that the defense investigators also spoke with Petitioner’s father, but
17 did not speak with Petitioner’s mother, despite the fact that she was home at the time of
18 their visit. (Lodgment No. 110, Ex. 49 at 2.) Vicars also recalls speaking to Eusebio and
19 another brother home during that visit, adding that: “I also recall seeing the sister
20 somewhere a second time other than the day we interviewed her.” (Id.) Attorney Herrera
21 recalls visiting the family’s ranch in Tecate with co-counsel once, visiting Petitioner’s
22 home once, and visiting the ranch on another occasion. (Id., Ex. 44 at 6.) Petitioner’s
23 mother Leticia recalls the visits by counsel and consular officials: “I remember Mexican
24 consular officials spoke with my husband and I during Jaime’s trial investigation and I
25 remember than Jaime’s trial attorneys came to Tecate two times, each visit lasting about
26 three hours. My husband was scared and distrustful of the American legal system because
27 it was so unfamiliar to him.” (Lodgment No. 114, Ex. 79 at 34.) Two of Petitioner’s
28 siblings state that they would have provided additional information had they been asked.

1 Petitioner's brother Eusebio states: "I remember Jaime's trial attorneys and investigators
2 only visited Tecate a couple of times and they didn't stay for that long. If they had stayed
3 longer and asked more questions I would have given them more information." (Id., Ex. 82
4 at 4.) Maria Elena states that: "Jaime's trial defense team only came to Tecate two times
5 staying a few hours on each visit. I don't have any idea what information might have been
6 useful, but I would have given a lot more information had they really wanted to talk to me."
7 (Id., Ex. 83 at 5.) Petitioner himself acknowledges that he "did not fully open up to his
8 attorneys," explaining that he did not fully understand the proceedings or trust his counsel
9 due to the difficulties in understanding the differences between the Mexican and American
10 systems, the fact that he did not speak English and he was not provided with translations
11 of some documents, and the fact that he felt his attorneys did not visit him sufficiently.
12 (Lodgment No. 115, Ex. 84A at 14-15.)

13 The record also reflects that the defense retained an expert to evaluate Petitioner's
14 mental health. Attorney Herrera, who asked psychologist Dr. MacSpeiden to interview
15 and evaluate Petitioner, states that: "I did not know of any head injuries or loss of
16 consciousness by Jaime as a child. I did not bring to Dr. McSpeiden's [sic] attention the
17 fact that Mr. Hoyos was tortured, or any issues related to drug use or addiction, and I did
18 not direct his attention to any of those things. The materials we provided him, so far as I
19 can now recall, related only to the crimes for which Mr. Hoyos was charged." (Lodgment
20 No. 110, Ex. 44 at 7.) Dr. MacSpeiden conducted an extensive interview and evaluation
21 of Petitioner, meeting with him on five separate occasions between January and April 1993,
22 conducting numerous psychological tests and compiling extensive background and offense
23 information, resulting in a 24 page psychological evaluation. (See Lodgment No. 113, Ex.
24 93.) A review of the background information reveals that, similar to Petitioner's family
25 members, Petitioner downplayed his drug use, stating that "he had misused only heroin" in
26 his early twenties and "no more than 'several times.'" (Id. at 7.) Petitioner stated that his
27 father "was okay," and noted that his father was more strict than his mother, as he would
28 punish the children and "[s]ometimes he'd spank us." (Id. at 3.) Petitioner failed to

1 mention any history of head injuries or loss of consciousness to the psychologist, as
2 Petitioner “initially said he had suffered no unusual illnesses, accidents or physical
3 abnormalities, but then pointed out he is absent the thumb on his right hand.” (Id. at 4.)
4 After detailing the events leading up to the amputation, the report stated that “[o]therwise
5 he thought his medical history unremarkable.” (Id.) Petitioner similarly told Dr.
6 MacSpeiden that his adolescent and young adult years were rather unremarkable, that he
7 got “regular” grades in school, was suspended on a few occasions for pranks but did not
8 get in trouble with the law, and was truant on occasion. (Id. at 4-5.) He told the
9 psychologist of his working life, family life and children, and legal troubles as an adult,
10 stating that his incarceration at La Mesa prison was “uneventful.” (Id. at 5.) With respect
11 to the testing conducted, Dr. MacSpeiden reported that: “This client’s MMPI-2 clinical
12 profile is within normal limits and no clinical diagnosis is provided.” (Id. at 21.) The
13 psychologist noted that the testing raised the possibility that Petitioner suffered from
14 addictive problems, and he recommended that: “Further evaluation of alcohol or drug usage
15 is recommended.” (Id.) Dr. MacSpeiden also indicated that: “There appears to be no
16 pressing need for psychological treatment, and restrictive administrative management will
17 probably not be necessary for him.” (Id.) Case coordinator Bunny Amendola’s
18 recollections are consistent, as she states that: “Dr. MacSpeiden ran psychological tests on
19 Jaime for us. He was an expert that the Public Defender’s office frequently used.
20 MacSpeiden said that Jaime tested more psychologically normal than any person he had
21 dealt with. He was startled by how normal Jaime’s psychological results were. It seemed
22 strange to us too.” (Lodgment No. 110, Ex. 48 at 4.) Herrera states that after receiving the
23 psychological evaluation, he declined to order any additional testing, explaining that: “My
24 thinking then was focused entirely on whether or not Mr. Hoyos suffered from
25 psychological problems. When my own belief in his normality in this area was confirmed
26 by Dr. MacSpeiden, I made no further consideration of using any expert to examine Mr.
27 Hoyos’s mental functioning.” (Id., Ex. 44 at 7.) Public defender records show
28 disbursements to a psychiatrist in addition to those to the psychologist, but the record does

1 not provide details about the reason for the former expenditure. (Lodgment No. 113, Ex.
2 98.)

3 Herrera also states that “Mr. Hoyos informed me that he had been tortured, but he
4 said no more, and I did not ask him to provide me any details.” (Lodgment No. 110, Ex.
5 44 at 7.) Yet, the record reflects that even if counsel did not question Petitioner, the defense
6 did investigate the matter, as counsel obtained court records on Petitioner’s prior
7 convictions and criminal activities and consulted Professor Alfaro, a social anthropologist
8 who studied and wrote about the use of torture in Baja Mexico, stating: “We were prepared
9 to use him as an expert witness if the judge was inclined to allow the priors into evidence
10 as aggravating factors during the penalty phase of Mr. Hoyos’ trial.” (Id. at 4.) Counsel
11 states that the conviction records the defense obtained “made it clear that Mr. Hoyos’s
12 convictions were the result of coercion, and probably torture.” (Id.) As mentioned above,
13 the trial record reflects that the defense’s penalty phase presentation was shaped by the fact
14 that the trial court disallowed introduction of Petitioner’s prior convictions as aggravation
15 “on grounds that they were unreliable and coerced confessions.” (See id.; see also RT
16 4511-13.) Herrera recalls that “the court did allow the prosecutor to ask ‘have you heard’-
17 type questions to any character witness we might present, to see if they knew about these
18 prior convictions, or had heard about the actions Mr. Hoyos was alleged to have done.”
19 (Lodgment No. 110, Ex. 44 at 4.) Herrera states that the defense investigation did not
20 uncover significant evidence in mitigation, and that: “Therefore, we chose to avoid any
21 kind of character evidence or expert testimony, in order to completely exclude any
22 questioning of witnesses by the prosecutor along the lines of whether or not they knew
23 about the actions Mr. Hoyos had done in order to have been convicted of a felony in
24 Mexico.” (Id. at 8; see also RT 4511-13.) Professor Alfaro’s recollection is consistent
25 with that reflected in the trial record, as he indicates that: “I was contacted in 1994 by Mr.
26 Hoyos’ trial attorneys, as asked to testify on his behalf about the routine use of torture to
27 obtain confessions of crimes. I agreed to do so, and would have testified then to what I
28 have said in this declaration. However, trial counsel told me that the judge had agreed not

1 to allow the presentation of Mr. Hoyos [sic] prior convictions and that I would not be
2 necessary." (Lodgment No. 115, Ex. 86A at 4.)

3 Under Strickland, a reviewing court must give deference to trial counsel's decisions
4 and refrain from concluding that trial counsel was ineffective based solely on a
5 disagreement with those decisions. See Strickland, 466 U.S. at 689 ("It is all too tempting
6 for a defendant to second-guess counsel's assistance after conviction or adverse sentence,
7 and it is all too easy for a court, examining counsel's defense after it has proved
8 unsuccessful, to conclude that a particular act or omission was unreasonable.") However,
9 because the California Supreme Court rejected this claim on the merits, this Court's review
10 must afford deference not only to trial counsel's decisions pursuant to Strickland, but to
11 the state court decision as well. See Richter, 562 U.S. at 105 ("When § 2254(d) applies,
12 the question is not whether counsel's actions were reasonable. The question is whether
13 there is any reasonable argument that counsel satisfied Strickland's deferential standard.")

14 Here, there is a reasonable argument that counsel acted in a constitutionally
15 acceptable manner in the investigation and presentation of the penalty phase case, despite
16 the omissions noted above. The record reflects that members of the defense team,
17 including attorneys and investigators, traveled to Tecate and other areas on numerous
18 occasions to investigate Petitioner's family history, including speaking to a number of
19 Petitioner's family members and friends. Counsel also retained a mental health expert to
20 interview and evaluate Petitioner's psychological makeup, the results of which were
21 generally normal. Counsel investigated the torture angle with respect to Petitioner's prior
22 criminal activity and convictions, including obtaining his criminal records and consulting
23 with a relevant expert, and in doing so, succeeded in excluding their introduction from the
24 penalty phase proceedings. It is also apparent from the record that, in light of the
25 information obtained during the defense investigation into Petitioner's background, trial
26 counsel made a strategic decision to focus on sympathy and avoid introducing character
27 testimony to keep evidence of the prior criminal activity from the jury. (See RT 4511-13;
28 Lodgment No. 110, Ex. 44 at 7-8.)

1 The California Supreme Court could have reasonably concluded that trial counsel's
2 strategic decision supported the limits on the defense investigation, including the decision
3 not to present mental health testimony experts or offer character testimony from family
4 members in order to avoid jeopardizing the defense's success in excluding mention of
5 Petitioner's prior criminal activities. See Richter, 562 U.S. at 102 ("Under § 2254(d), a
6 habeas court must determine what arguments or theories supported or, as here, could have
7 supported, the state court's decision; and then it must ask whether it is possible fairminded
8 jurists could disagree that those arguments or theories are inconsistent with the holding in
9 a prior decision of this Court.") "There are countless ways to provide effective assistance
10 in any given case. Even the best criminal defense attorneys would not defend a particular
11 client in the same way." Strickland, 466 U.S. at 689. Petitioner fails to show that the
12 defense investigation, and the decisions of trial counsel reflected in the record, fell below
13 constitutional guarantees.

14 The California Supreme Court could have also reasonably rejected this contention
15 based on Petitioner's failure to demonstrate prejudice under Strickland. See Mirzayance,
16 556 U.S. at 122 ("[A] defendant must show both deficient performance and prejudice in
17 order to prove that he has received ineffective assistance of counsel."), citing Strickland,
18 466 U.S. at 687. As mentioned above, the Ninth Circuit instructs that: "In a case in which
19 counsel's error was a failure adequately to investigate, demonstrating Strickland prejudice
20 requires showing both a reasonable probability that counsel would have made a different
21 decision had he investigated, and a reasonable probability that the different decision would
22 have altered the outcome." Bemore, 788 F.3d at 1169, citing Wiggins, 539 U.S. at 535-36.
23 Herrera now states that: "I believe now that we should have investigated further than we
24 did, in large part because we did not quickly find evidence of what we thought to be the
25 only mitigating factors. I understand that just because Mr. Hoyos did not grow up in a
26 typically impoverished environment, and was not badly abused as a child, did not mean
27 that he was not acting under compulsion and with significant limitations, and was not an
28 individual." (Lodgment No. 110, Ex. 44 at 9.) Herrera also appears to leave open the

1 possibility that the defense strategy could have differed depending on what could have been
2 developed from a more complete investigation, and states that: “Mr. Hoyos’s prior
3 convictions that led to prison terms in Mexico (drug transporting, a driver for a robbery of
4 a telegraph office) were serious, but not remotely as serious as the commitment offense.”
5 (Id. at 8.)

6 Yet, Petitioner ultimately fails to establish a reasonable probability that employing
7 the strategy advanced here would have led to different penalty phase outcome, given the
8 strength of the aggravating evidence, particularly the circumstances of the crime. See
9 Wiggins, 539 U.S. at 534 (“In assessing prejudice, we reweigh the evidence in aggravation
10 against the totality of available mitigating evidence.”); see also Williams, 529 U.S. at 397-
11 98, Wong, 558 U.S. at 26 (“[T]he reviewing court must consider all the evidence—the good
12 and the bad—when evaluating prejudice.”), citing Strickland, 466 U.S. at 695-96.

13 First, trial counsel only notes two prior crimes, while the trial prosecutor voiced an
14 intention to ask about five separate instances of previous criminal activity, spanning well
15 over a decade, had the defense introduced character testimony. (See RT 4511-18.) While
16 testimony about Petitioner’s childhood and upbringing, including evidence about his strict
17 and physically abusive father, Petitioner’s history of drug addiction and that he suffered
18 multiple instances of torture at the hands of legal and correctional authorities in Mexico
19 would have certainly been mitigating, the impact of such evidence would have been
20 tempered by the prosecutor’s stated intention to ask any character witnesses if they had
21 heard about Petitioner’s prior criminal activity. Petitioner’s lengthy and varied criminal
22 history, while not as steeped in violence as the circumstances of the instant offenses, would
23 have at a minimum diluted the weight of such mitigating evidence, particularly considering
24 that the prior crimes evinced Petitioner’s long-standing involvement in drug trafficking
25 activities, and the murders at issue in the instant case were clearly drug-related.

26 While Petitioner could have introduced family members’ anecdotal accounts of his
27 prior head injuries, he fails to offer evidence showing how such injuries, on their own,
28 constitute mitigating evidence. The psychologist who evaluated Petitioner prior to trial

1 asked about previous injuries and Petitioner failed to disclose any such history, nor has
2 Petitioner offered any indication how the expert's evaluation or conclusions may have
3 differed had such injuries been disclosed. While Dr. Weinstein, who evaluated Petitioner
4 during post-conviction proceedings, states that Petitioner may be intellectual disabled, he
5 refrains from actually rendering such a diagnosis without further investigation. In any
6 event, any failures by Dr. MacSpeiden cannot be attributed to trial counsel. See Fairbank
7 v. Ayers, 650 F.3d 1243, 1252 (9th Cir. 2011) ("An expert's failure to diagnose a mental
8 condition does not constitute ineffective assistance of *counsel*, and [a petitioner] has no
9 constitutional guarantee of effective assistance of experts."), quoting Earp v. Cullen, 623
10 F.3d 1065, 1077 (9th Cir. 2010) (emphasis and bracket in original). Petitioner also asserts
11 that trial counsel should have procured a mental health expert to investigate the reasons for
12 his drug use and contends that counsel also failed to present the jury with evidence that
13 Petitioner's childhood behavior indicated that he suffered from learning disabilities.
14 However, Petitioner only speculates that an expert would have concluded Petitioner
15 suffered from learning disabilities, or that exploring his history of drug use would have
16 provided additional mental health mitigating evidence. In addition, Petitioner admits that
17 he withheld evidence of his drug use and addiction from counsel. Without declarations or
18 other evidence outlining the expert testimony counsel allegedly should have presented,
19 Petitioner cannot establish prejudice. See Grisby, 130 F.3d at 373 ("Speculation about
20 what an expert could have said is not enough to establish prejudice.")

21 Thus, even had trial counsel pursued the strategy Petitioner now espouses, the Court
22 remains unpersuaded that the additional evidence in mitigation would have overcome the
23 substantial aggravating evidence. Again, the introduction of the mitigating evidence would
24 have allowed repeated reference to Petitioner's prior criminal activity, which, while not as
25 serious or grave as the crimes at issue at trial, showed that Petitioner had a substantial
26 criminal history that spanned over a decade. Moreover, wholly apart from this criminal
27 history, the circumstances of the crimes against the Magoon family were extremely brutal
28 and amounted to significant evidence in aggravation, as Mary Magoon suffered numerous

1 blunt force injuries to her head and back prior to her death, as well as several gunshot
2 wounds, including one to the back of the head. Her three-year-old son was shot in the head
3 and was likely near his mother at the time of his wounding and her death. Her husband
4 was also shot and killed. Two individuals killed and a child severely wounded, for cash
5 and drugs. Evidence of Petitioner's childhood, drug abuse and the other evidence now
6 offered in mitigation does not offset the powerful evidence in aggravation.

7 Therefore, to the extent the California Supreme Court's rejection of Petitioner's
8 claim of ineffective assistance of trial counsel at the penalty phase was due to a failure to
9 demonstrate prejudice, Petitioner fails to show that such a resolution was either contrary
10 to, or an unreasonable application of, Strickland or that it was based on an unreasonable
11 determination of the facts. See Richter, 562 U.S. at 112 ("The likelihood of a different
12 result must be substantial, not just conceivable.") Claim 23 does not merit habeas relief.

13 Given Petitioner's failure to satisfy section 2254, an evidentiary hearing is not
14 warranted on Claim 23. See Sully, 725 F.3d at 1075 ("[A]n evidentiary hearing is pointless
15 once the district court has determined that § 2254(d) precludes habeas relief.")

16 **E. Systemic Claims**

17 **1. Claim 24**

18 Petitioner contends that "[t]he California capital sentencing statute contains
19 numerous invalidities, including the over-breadth of Penal Code section 190.2; the
20 pervasive arbitrariness and capriciousness in the imposition of death sentences; and in the
21 absence of adequate safeguards to ensure any death sentence is reliably and fairly imposed
22 in conformity with the demands of the Eighth Amendment," and "is equally incompatible
23 with international law and basic standards of decency." (SAP at 167.) Petitioner does not
24 outline or detail these challenges in the SAP itself, but instead notes that "[t]he deficiencies
25 in the California statute are set forth in detail in Appellant's Opening Brief, Argument XV."
26 (Id.)

27 Petitioner presented this claim to the California Supreme Court on direct appeal,
28 which the state court rejected in a reasoned decision as follows:

1 Defendant attacks the constitutionality of California's death penalty
2 statute on numerous grounds. We reaffirm the decisions that have rejected
3 similar claims and decline to reconsider such authorities, as follows:

4 That certain noncapital sentencing proceedings may require jury
5 unanimity or proof beyond a reasonable doubt does not mean the death penalty
6 statute violates the equal protection clause of the Fourteenth Amendment.
7 (*People v. Rogers* (2006) 39 Cal.4th 826, 893, 48 Cal.Rptr.3d 1, 141 P.3d 135
8 (*Rogers*); *Blair, supra*, 36 Cal.4th at p. 754, 31 Cal.Rptr.3d 485, 115 P.3d
9 1145; *People v. Davis* (2005) 36 Cal.4th 510, 571–572, 31 Cal.Rptr.3d 96,
10 115 P.3d 417.) “The death penalty law is not unconstitutional for failing to
11 impose a burden of proof—whether beyond a reasonable doubt or by a
12 preponderance of the evidence—as to the existence of aggravating
13 circumstances, the greater weight of aggravating circumstances over
14 mitigating circumstances, or the appropriateness of a death sentence.” (*Lewis*
15 and *Oliver, supra*, 39 Cal.4th at p. 1066, 47 Cal.Rptr.3d 467, 140 P.3d 775,
16 citing *People v. Brown*, (2004) 33 Cal.4th 382, 401, 15 Cal.Rptr.3d 624, 93
17 P.3d 244.) Indeed, the trial court need not and should not instruct the jury as
18 to any burden of proof or persuasion at the penalty phase. (*Rogers, supra*, 39
19 Cal.4th at p. 893, 48 Cal.Rptr.3d 1, 141 P.3d 135; *Blair, supra*, 36 Cal.4th at
20 p. 753, 31 Cal.Rptr.3d 485, 115 P.3d 1145.)

21 The Eighth and Fourteenth Amendments do not require that a jury
22 unanimously find the existence of aggravating factors or that it make written
23 findings regarding aggravating factors. (*Rogers, supra*, 39 Cal.4th at p. 893,
24 48 Cal.Rptr.3d 1, 141 P.3d 135; *Blair, supra*, 36 Cal.4th at p. 753, 31
25 Cal.Rptr.3d 485, 115 P.3d 1145.) In addition, the United States Supreme
26 Court's recent decisions interpreting the Sixth Amendment's jury trial
27 guarantee (*United States v. Booker* (2005) 543 U.S. 220, 125 S.Ct. 738, 160
28 L.Ed.2d 621; *Blakely v. Washington* (2004) 542 U.S. 961, 125 S.Ct. 21, 159
29 L.Ed.2d 851; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153
30 L.Ed.2d 556; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348,
31 147 L.Ed.2d 435) have not changed our prior conclusions regarding burden
32 of proof or jury unanimity at the penalty phase. (*Lewis and Oliver, supra*, 39
33 Cal.4th at p. 1066, 47 Cal.Rptr.3d 467, 140 P.3d 775; *Rogers, supra*, 39
34 Cal.4th at 893, 48 Cal.Rptr.3d 1, 141 P.3d 135.)

35 Section 190.2—setting out the special circumstances that, if found true,
36 render a defendant eligible for the death penalty—adequately narrows the
37 category of death-eligible defendants in conformity with the requirements of
38 the Eighth and Fourteenth Amendments. (*Rogers, supra*, 39 Cal.4th at pp.

1 892-893, 48 Cal.Rptr.3d 1, 141 P.3d 135; *Blair, supra*, 36 Cal.4th at p. 752,
2 31 Cal.Rptr.3d 485, 115 P.3d 1145; *People v. Barnett* (1998) 17 Cal.4th 1044,
3 1179, 74 Cal.Rptr.2d 121, 954 P.2d 384.)

4 Section 190.3, factor (a)—which permits consideration of the
5 “circumstances of the crime” as an aggravating factor—is not impermissibly
6 vague and provides adequate guidance to a jury in sentencing. (*People v.*
7 *Prieto* (2003) 30 Cal.4th 226, 276, 133 Cal.Rptr.2d 18, 66 P.3d 1123 (*Prieto*);
8 *People v. Lewis* (2001) 26 Cal.4th 334, 394, 110 Cal.Rptr.2d 272, 28 P.3d 34.)

9 There is no requirement under the jury trial guarantee of the Sixth
10 Amendment, the cruel and unusual punishment clause of the Eighth
11 Amendment, or the due process or equal protection guarantees of the
12 Fourteenth Amendment that a jury find the existence of unadjudicated
13 criminal activity under section 190.3, factor (b), unanimously or beyond a
14 reasonable doubt. (*Rogers, supra*, 39 Cal.4th at 894, 48 Cal.Rptr.3d 1, 141
15 P.3d 135; *Blair, supra*, 36 Cal.4th at p. 753, 31 Cal.Rptr.3d 485, 115 P.3d
16 1145.)

17 The use of restrictive adjectives—i.e., “extreme” and “substantial”—in
18 the list of mitigating factors in section 190.3 does not act unconstitutionally
19 as a barrier to the consideration of mitigation. (*People v. Harris* (2005) 37
20 Cal.4th 310, 365, 33 Cal.Rptr.3d 509, 118 P.3d 545; *Brown, supra*, 33 Cal.4th
21 at p. 402, 15 Cal.Rptr.3d 624, 93 P.3d 244; *Prieto, supra*, 30 Cal.4th at p. 276,
22 133 Cal.Rptr.2d 18, 66 P.3d 1123.)

23 Intercase proportionality review is not required by the due process,
24 equal protection, fair trial, or cruel and unusual punishment clauses of the
25 federal Constitution. (*Rogers, supra*, 39 Cal.4th at p. 894, 48 Cal.Rptr.3d 1,
26 141 P.3d 135; *Blair, supra*, 36 Cal.4th at p. 753, 31 Cal.Rptr.3d 485, 115 P.3d
27 1145.)

28 Capital punishment per se does not violate the Eighth Amendment’s
29 proscription against cruel and unusual punishment. (*People v. Moon* (2005)
30 37 Cal.4th 1, 47, 32 Cal.Rptr.3d 894, 117 P.3d 591; *People v. Staten* (2000)
31 24 cal.4th 434, 462, 101 Cal.Rptr.2d 213, 11 P.3d 968.) We have recently
32 rejected the argument that we should reconsider our position in light of the
33 abolition of the death penalty by the nations of Western Europe, and the
34 United States Supreme Court’s ruling in *Atkins v. Virginia* (2002) 536 U.S.
35 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 that the execution of mentally retarded
36 persons constitutes cruel and unusual punishment. (*Moon, supra*, 37 Cal.4th
37 892-893, 48 Cal.Rptr.3d 1, 141 P.3d 135; *Blair, supra*, 36 Cal.4th at p. 752,
38 31 Cal.Rptr.3d 485, 115 P.3d 1145; *People v. Barnett* (1998) 17 Cal.4th 1044,
39 1179, 74 Cal.Rptr.2d 121, 954 P.2d 384.)

1 at pp. 47–48, 32 Cal.Rptr.3d 894, 117 P.3d 591.)

2 Hoyos, 41 Cal. 4th at 925-27 (footnote omitted).

3 **A. Failure to Narrow**

4 Petitioner asserts that “California’s death penalty statute does not meaningfully
5 narrow the pool of murderers eligible for the death penalty,” and that the “death penalty is
6 imposed randomly on a small fraction of those who are death-eligible,” in violation of the
7 Eighth and Fourteenth Amendments. (SAP at 167; Lodgment No. 100 at 298.)

8 Petitioner fails to cite to Supreme Court authority supporting his contention that the
9 California capital statute fails to comply with constitutional guarantees in this manner and
10 indeed conceded in the state court that “[t]he issue presented here has not been addressed
11 by the United States Supreme Court. (*Id.* at 302.) Meanwhile, the Ninth Circuit has on
12 multiple occasions rejected arguments asserting that the California capital statute fails to
13 perform the narrowing function, as follows:

14 With regard to this claim, we reject Karis’ argument that the scheme does not
15 adequately narrow the class of persons eligible for the death penalty. The
16 California statute satisfies the narrowing requirement set forth in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The special
17 circumstances in California apply to a subclass of defendants convicted of
18 murder and are not unconstitutionally vague. *See id.* at 972, 103 S.Ct. 2733.
19 The selection requirement is also satisfied by an individualized determination
20 on the basis of the character of the individual and the circumstances of the
21 crime. *See id.* California has identified a subclass of defendants deserving of
22 death and by doing so, it has “narrowed in a meaningful way the category of
23 defendants upon whom capital punishment may be imposed.” *Arave v. Creech*, 507 U.S. 463, 476, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993).

24 Karis v. Calderon, 283 F.3d 1117, 1141 n. 11 (9th Cir. 2002); see also Mayfield v.
25 Woodford, 270 F.3d 915, 924 (9th Cir. 2001) (en banc) (“A reasonable jurist could not
26 debate, therefore, that the 1978 California statute, which narrowed the class of death-
27 eligible defendants at both the guilt and penalty phases, was constitutional.”)

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1 Given the absence of Supreme Court authority, the Court is unable to conclude that
2 the state court's rejection of this claim is contrary to, or an unreasonable application of,
3 clearly established federal law.

4 **B. Section 190.3(a)**

5 Petitioner contends that Cal. Penal Code section 190.3(a) "has been applied in such
6 a wanton and freakish manner that almost all features of every murder, even features
7 squarely at odds with features deemed supportive of death sentences in other cases, have
8 been characterized as 'aggravating' within the statute's meaning." (SAP at 167; Lodgment
9 No. 100 at 303.) Specifically, Petitioner argues that the aggravating factor, which allows
10 the jury to consider the circumstances of the crime, "is being relied upon as an aggravating
11 factor in every case, by every prosecutor, without any limitation whatever [sic]." (*Id.* at
12 310.) Petitioner acknowledges that factor (a) has been upheld by the Supreme Court, yet
13 argues that its application is so arbitrary and contradictory as to violate due process and the
14 Eighth Amendment. (*Id.* at 305.)

15 As Petitioner recognizes, the Supreme Court has specifically rejected challenges of
16 vagueness with respect to several California capital sentencing factors, including factor (a).
17 See Tuilaepa v. California, 512 U.S. 967, 975-78 (1994). The Tuilaepa Court stated that
18 "vagueness review is quite deferential," and explained that "a factor is not unconstitutional
19 if it has some 'common-sense core of meaning . . . that criminal juries should be capable
20 of understanding.'" Tuilaepa, 512 U.S. at 973, quoting Jurek, 428 U.S. at 279 (White, J.,
21 concurring). Because the Supreme Court instructs that vagueness review is "quite
22 deferential" and has explicitly upheld the constitutionality of factor (a), Petitioner fails to
23 offer any persuasive argument demonstrating that the state supreme court's rejection of
24 this claim is either contrary to, or an unreasonable application of, clearly established federal
25 law.

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C. Lack of Safeguards

Petitioner alleges that the California capital scheme is unconstitutional due to its failure to require a burden of proof and unanimity in finding the existence of aggravating factors, failure to require written findings, failure to require that the jury find that the aggravation outweighs the mitigation beyond a reasonable doubt or a preponderance of the evidence before imposing the death penalty, allowing the introduction of unadjudicated criminal activity as evidence in aggravation, failure to require or allow proportionality review, and the use of terms that act as barriers to the consideration of mitigation. (SAP at 167; Lodgment No. 100 at 311-52.)

1. Failure to Require Unanimity

First, Petitioner argues that the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002), compel a conclusion that a capital penalty jury must unanimously find factors in aggravation to be true beyond a reasonable doubt, and renders the California capital statute unconstitutional. (SAP at 167; Lodgment No. 100 at 313-14.)

In Apprendi, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id., 530 U.S. at 490. “Ring altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment,” by holding that ““a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty.”” Schriro v. Summerlin, 542 U.S. 348, 353 (2004), quoting Ring, 536 U.S. at 609 (bracket in original).

However, “[a] defendant in California is eligible for the death penalty when the jury finds him guilty of first-degree murder and finds one of the § 190.2 special circumstances true.” Tuilaepa, 512 U.S. at 975, citing California v. Ramos, 463 U.S. 992, 1008 (1983); see also Cal. Penal Code § 190.2. As such, a California penalty phase jury’s finding that

1 the aggravation significantly outweighs the evidence in mitigation does not “increase” the
2 penalty for first-degree murder beyond the statutory maximum and Petitioner fails to
3 persuasively show that it is implicated by either Apprendi or Ring. Petitioner fails to
4 demonstrate that the state supreme court’s rejection of this claim was contrary to, or an
5 unreasonable application of, clearly established federal law.

6 **2. Failure to Require Written Findings**

7 Next, Petitioner alleges that the California capital statute fails to require specific or
8 written findings regarding aggravating factors, violating Petitioner’s right to due process
9 and meaningful appellate review. (SAP at 167; Lodgment No. 100 at 341-45.)

10 The Ninth Circuit has held that California’s death penalty statute “need not require
11 written jury findings in order to be constitutional.” Williams v. Calderon, 52 F.3d 1465,
12 1484-85 (9th Cir. 1995), citing Harris v. Pulley, 692 F.3d 1189, 1195-96 (9th Cir. 1982),
13 reversed on other grounds by Pulley v. Harris, 465 U.S. 37, 53-54 (1984). Petitioner fails
14 to cite to any clearly established law compelling a conclusion that written findings are
15 constitutionally required.

16 In the absence of any such authority, Petitioner fails to show that the state court’s
17 rejection of this claim was contrary to, or an unreasonable application of, clearly
18 established federal law.

19 **3. Failure to Require Burden of Proof**

20 Petitioner also insists that the California capital statute is infirm because
21 constitutional guarantees of due process and against cruel and unusual punishment require
22 the penalty phase jury be instructed that they can only impose a death sentence if they find
23 beyond a reasonable doubt that the evidence in aggravation outweighs that in mitigation
24 and the death sentence is warranted. (SAP at 167; Lodgment No. 100 at 331.)

25 Petitioner’s jury was instructed pursuant to California law that they were to weigh
26 the “totality” of the evidence in aggravation against the “totality” of that in mitigation and
27 “[t]o return a judgment of death, each of you must be persuaded that the aggravating
28 circumstances are so substantial in comparison with the mitigating circumstances that it

1 warrants death instead of life without parole.” (RT 4839-40, 4898, CT 3311-12.) The
2 argument lacks support, as the Supreme Court has upheld the constitutionality of the
3 California capital statute, stating that: “A capital sentencer need not be instructed how to
4 weigh any particular fact in the capital sentencing decision.” Tuilaepa, 512 U.S. at 979
5 (“Once the jury finds that the defendant falls within the legislatively defined category of
6 persons eligible for the death penalty, . . . the jury then is free to consider a myriad of
7 factors to determine whether death is the appropriate punishment.”), quoting Ramos, 463
8 U.S. at 1008. Moreover, the Ninth Circuit has explicitly rejected this argument. See
9 Williams, 52 F.3d at 1485 (“[T]he failure of the statute to require a specific finding that
10 death is beyond a reasonable doubt the appropriate penalty does not render it
11 unconstitutional.”) Accordingly, Petitioner fails to show that the state court’s rejection of
12 this claim was contrary to, or an unreasonable application of, clearly established federal
13 law.

14 **4. Unadjudicated Criminal Activity**

15 Petitioner also asserts that the introduction and consideration of unadjudicated
16 criminal activity at the penalty phase violates constitutional guarantees, and argued that
17 Ring and Apprendi require that “all of the findings prerequisite to a sentence of death must
18 be made beyond a reasonable doubt by a jury acting as a collective entity,” which includes
19 findings pertaining to prior criminal activity. (SAP at 167; Lodgment No. 100 at 350-51.)

20 First, Petitioner’s reliance on Ring and Apprendi is misplaced for the reasons
21 discussed above. Moreover, California law specifically provides for the introduction of
22 prior uncharged criminal conduct at capital penalty phase proceedings. See Cal. Penal
23 Code §190.3(b). The Supreme Court has generally noted that “[s]entencing courts have
24 not only taken into consideration a defendant’s prior convictions, but have also considered
25 a defendant’s past criminal behavior, even if no conviction resulted from that behavior.”
26 United States v. Nichols, 511 U.S. 738, 747 (1994). The Ninth Circuit has specifically
27 upheld the admission of unadjudicated criminal activity into evidence at penalty phase
28 proceedings. See McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir. 1997), amended

1 116 F.3d 364 (9th Cir. 1997), vacated in part by 130 F.3d 833, 835 (9th Cir. 1997) (en
2 banc). Petitioner fails to show that Supreme Court authority supports his contention and
3 as such, the Court cannot conclude that state court's rejection of this claim was either
4 contrary to, or an unreasonable application of, clearly established federal law.

5 **5. Lack of Proportionality Review**

6 Petitioner argues that the California Supreme Court has interpreted the California
7 capital statute as forbidding inter-case proportionality review and that the state court's
8 refusal to engage in such review violates the federal Constitution. (SAP at 167; Lodgment
9 No. 100 at 345-50.)

10 The Ninth Circuit has specifically rejected the contention that the California death
11 penalty statute violates the federal Constitution due to a lack of proportionality review,
12 reasoning that such an "argument is foreclosed by the Supreme Court's holding in Pulley
13 v. Harris, 465 U.S. 37, 43-46, 104 S.Ct 871, 79 L.Ed.2d 29 (1984), that neither the Eighth
14 Amendment nor due process requires proportionality review in imposing the death
15 penalty." Allen v. Woodford, 395 F.3d 979, 1018 (9th Cir. 2005). In light of the lack of
16 clearly established authority supporting his argument, Petitioner fails to demonstrate that
17 the state supreme court's rejection of this claim was contrary to, or an unreasonable
18 application of, clearly established federal law.

19 **6. Barriers to the Consideration of Mitigation**

20 Petitioner asserts that the use of the terms "extreme" and "substantial" in Cal. Penal
21 Code section 190.3 factors (d) and (g) "acted as barriers to the consideration of mitigation,"
22 in violation of the Constitution. (SAP at 167; Lodgment No. 100 at 352.)

23 Petitioner fails to cite to clearly established law that compels the outcome he seeks.
24 In fact, the Supreme Court rejected a challenge to another state capital sentencing statute
25 that employs the terms "extreme" and "substantially" in a similar manner, rejecting the
26 argument that "these instructions impermissibly precluded the jury's consideration of
27 lesser degrees of disturbance, impairment, or duress," and reasoning that the "judge at
28 petitioner's trial made clear to the jury that these were merely items it could consider, and

1 that it was also entitled to consider ‘any other mitigating matter concerning the character
2 or record of the defendant, or the circumstances of his offense.’” Blystone v. Pennsylvania,
3 494 U.S. 299, 308 (1990); see also Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir.
4 1992) (use of term “extreme” in penalty phase instructions did not impermissibly prevent
5 jurors from considering relevant evidence in mitigation), citing Blystone, 494 U.S. at 308.
6 Like those cases, the trial court in Petitioner’s case also instructed the penalty phase jury
7 that it, pursuant to factor (k), could consider “any other circumstance which extenuates the
8 gravity of the crime even though it is not a legal excuse for the crime and any sympathetic
9 or other aspect of the defendant’s character or record that the defendant offers as a basis
10 for a sentence less than death, whether or not related to the offense for which he is on trial.”
11 (RT 4897, CT 3310.)

12 Accordingly, the California Supreme Court’s rejection of this contention was neither
13 contrary to, or an unreasonable application of, clearly established federal law.

14 **D. Equal Protection**

15 Petitioner argues that “California’s death penalty scheme provides significantly
16 fewer procedural protections for persons facing a death sentence than are afforded persons
17 charged with non-capital crimes,” and that “[t]his differential treatment violates the
18 constitutional guarantee of equal protection of the laws.” (SAP at 167; Lodgment No. 100
19 at 352.)

20 “The Equal Protection Clause of the Fourteenth Amendment commands that no State
21 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is
22 essentially a direction that all persons similarly situated should be treated alike.” City of
23 Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985), quoting Plyler v.
24 Doe, 457 U.S. 202, 216 (1982). The Supreme Court has held that “the penalty of death is
25 qualitatively different from a sentence of imprisonment, however long,” and as such, “there
26 is a corresponding difference in the need for reliability in the determination that death is
27 an appropriate punishment in a specific case.” Woodson v. North Carolina, 428 U.S. 280,
28 305 (1976). However, because capital and non-capital defendants are not “similarly

1 situated” to one another, Petitioner fails to persuasively demonstrate that differences in
2 procedural rules implicate equal protection principles. See Massie v. Hennessey, 875 F.2d
3 1386, 1389 (9th Cir. 1989) (“The relevant comparison for equal protection purposes is
4 between two defendants, both of whom are sentenced to death.”)

5 Given the lack of Supreme Court authority supporting his contention, Petitioner has
6 not shown that the California Supreme Court’s rejection of this claim on appeal was either
7 contrary to, or an unreasonable application of, clearly established federal law.

8 **E. International Norms**

9 Finally, Petitioner argues that the state of California’s use of the death penalty “falls
10 short of international norms” and violates the Eighth and Fourteenth Amendments to the
11 United States Constitution. (SAP at 167; Lodgment No. 100 at 362.) He asserts that
12 capital punishment is “unconstitutional in this country inasmuch as international law is a
13 part of our law.” (Id. at 365.)

14 This claim is similar in scope and aim to the contention raised in Claim 26. As
15 discussed below with respect to that claim, Petitioner fails to offer any clearly established
16 federal law that supports his claim of constitutional error. In the absence of controlling
17 authority, Petitioner has not shown that the state supreme court’s rejection of this claim
18 was contrary to, or an unreasonable application of, clearly established federal law.

19 **F. Systemic Delay**

20 In the merits brief, Petitioner adds a “supplemental citation and argument as to the
21 failure of the California capital sentencing scheme to comply with the Eighth Amendment,”
22 citing to and relying on Jones v. Chappell, 31 F.Supp.3d 1050 (C.D. Cal. 2014), a case in
23 which a federal district court in California vacated a capital petitioner’s death sentence,
24 holding that California’s capital system was unconstitutional due to arbitrariness and delays
25 in the post-conviction review process. (Pet. Brief at 51.) Petitioner argues that his case
26 “demonstrat[es] the same systemic delay that cumulatively constituted cruel and unusual
27 punishment in Jones,” and also similar to Jones, “the state habeas corpus proceedings were
28 inadequate to provide a reasonable determination of the habeas claims.” (Id. at 52.) Setting

1 aside the significant hurdle posed by Petitioner’s failure to present and exhaust this
2 contention with the California Supreme Court, even had Petitioner previously raised and
3 exhausted an identical claim in state court, the district court’s decision is not binding on
4 this Court. Moreover, since the briefing, the Ninth Circuit reversed the district court’s
5 decision, finding that the relief sought was barred by Teague. See Jones v. Davis, 806 F.3d
6 538, 553 (9th Cir. 2015) (“Because Petitioner asks us to apply a novel constitutional rule,
7 we may not assess the substantive validity of his claim.”), rehearing and rehearing en banc
8 denied (9th Cir. 2016); but see Alfaro v. Johnson, 862 F.3d 1176, 1185 n. 5 (9th Cir. 2017)
9 (citing recent Supreme Court decisions in Welch v. United States, 578 U.S. ___, 136 S.Ct.
10 1257 (2016) and Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718 (2016), which
11 “suggest[] that, under the Supreme Court’s evolving interpretation of Teague, the rule she
12 seeks to advance may present a substantive rule,” but noting that “because Alfaro’s petition
13 can be resolved on alternative procedural grounds, we do not now decide the continued
14 vitality of our holding to the contrary in Jones.”) As it currently stands, Petitioner fails to
15 provide any clearly established authority in support of his claim for relief, in addition to
16 his failure to exhaust. Habeas relief is not warranted.

17 2. Claim 25

18 Petitioner asserts that he “suffers from serious mental disabilities of a
19 neuropsychological nature that are the functionally [sic] equivalent of mental retardation
20 with respect to diminishing his culpability, and that should also be deemed a bar to the
21 imposition of capital punishment,” relying on Atkins v. Virginia, 536 U.S. 304 (2002), in
22 which the Supreme Court barred the execution of intellectually disabled offenders. (SAP
23 at 168.) Petitioner requests an evidentiary hearing on this claim. (Id. at 55.)

24 Petitioner raised this claim as Claim XIV in the first state habeas petition and the
25 California Supreme Court rejected it on the merits without a statement of reasoning. (See
26 Lodgment Nos. 106, 118.)

27 “Capital punishment must be limited to those offenders who commit ‘a narrow
28 category of the most serious crimes’ and whose extreme culpability makes them ‘the most

1 deserving of execution.”” Roper v. Simmons, 543 U.S. 551, 568 (2005), quoting Atkins,
2 536 U.S. at 319. In accordance with this reasoning, the Supreme Court has specifically
3 held that certain classes of defendants, such as juveniles and the intellectually disabled, are
4 ineligible for the death penalty. See e.g. Roper, 543 U.S. at 571 (“Retribution is not
5 proportional if the law’s most severe penalty is imposed on one whose culpability or
6 blameworthiness is diminished, to a substantial degree, by reason of youth and
7 immaturity.”); Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986, 1992 (2014) (“No legitimate
8 penological purpose is served by executing a person with intellectual disability.”), citing
9 Atkins, 536 U.S. at 317, 320; see also Moore v. Texas, 581 U.S. ___, 137 S.Ct. 1039, 1048
10 (2017) (“In Atkins v. Virginia, we held that the Constitution ‘restrict[s] . . . the State’s
11 power to take the life of’ *any* intellectually disabled individual.”), quoting Atkins, 536 U.S.
12 at 321 (brackets and emphasis in original).

13 Petitioner contends that he “suffers from serious mental disabilities of a
14 neuropsychological nature that are the functionally [sic] equivalent of mental retardation
15 with respect to diminishing his culpability, and that should also be deemed a bar to the
16 imposition of capital punishment.” (SAP at 168.) Yet, Petitioner fails to cite any clearly
17 established federal law supporting his contention that Atkins bars the execution of
18 individuals with an arguably “equivalent” impairment, given that Atkins simply and clearly
19 holds only that “persons with intellectual disability may not be executed.” Hall, 134 S.Ct.
20 at 1992, citing Atkins, 536 U.S. at 321. As such, Petitioner fails to show that the state
21 court’s rejection of this argument was objectively unreasonable. See Richter, 562 U.S. at
22 101 (“[I]t is not an unreasonable application of clearly established Federal law for a state
23 court to decline to apply a specific legal rule that has not been squarely established by this
24 Court.”), quoting Mirzayance, 556 U.S. at 122 (bracket in original). However, in an
25 abundance of caution, and to the extent Petitioner alleges that his mental disabilities and
26 brain damage establish his intellectual disability and thus render him ineligible for the death
27 penalty under Atkins/Hall, the Court will consider that argument on the merits.

28 ///

1 “[T]he Eighth and Fourteenth Amendments to the Constitution forbid the execution
2 of persons with intellectual disability.” Hall, 134 S.Ct. at 1990, citing Atkins, 536 U.S. at
3 321. The State of California has developed rules and procedures to adjudicate claims of
4 intellectual disability,²² and has defined the term as follows: “As used in this section,
5 ‘intellectual disability’ means the condition of significantly subaverage general intellectual
6 functioning existing concurrently with deficits in adaptive behavior and manifested before
7 18 years of age.” Cal. Penal Code § 1376(a). California’s definition of intellectual
8 disability was developed in accordance with the standards discussed by the Supreme Court
9 in Atkins. See In re Hawthorne, 35 Cal. 4th 40, 47 (2005) (noting that “the clinical
10 definitions referenced in Atkins . . . conform to section 1376.”); Hall, 134 S.Ct. at 1994
11 (“As the Court noted in Atkins, the medical community defines intellectual disability
12 according to three criteria: significantly subaverage intellectual functioning, deficits in
13 adaptive functioning (the inability to learn basic skills and adjust behavior to changing
14 circumstances), and onset of these deficits during the developmental period.”), citing
15 Atkins, 536 U.S. at 308, n. 3.

16 In order to state a claim of intellectual disability in state post-conviction proceedings,
17 California sets forth the following standard:

18 To state a *prima facie* case for relief, the petition must contain ‘a declaration
19 by a qualified expert stating his or her opinion that the (petitioner) is mentally
20 retarded . . .’ (§1376 subd. (b)(1).) Not only must the declarant be a qualified
21 expert, i.e., an individual with appropriate education, training, and experience,
22 the declaration must explain the basis for the assessment of mental retardation
23 in light of the statutory standard.

24 ²² The current version of Cal. Penal Code § 1376 replaces the term “mentally
25 retarded,” used in a previous version of the statute, with “intellectual disability.” This
26 change in terminology has been adopted by numerous entities, including the Supreme
27 Court. See e.g. Hall, 134 S.Ct. at 1990 (“Previous opinions of this Court have employed
28 the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to
describe the identical phenomenon.”) The Court will similarly use the term “intellectual
disability” unless directly quoting from a source that uses the prior terminology.

1 Hawthorne, 35 Cal. 4th at 47. Moreover, California requires that “the expert’s declaration
2 must set forth a factual basis for finding the petitioner has significantly subaverage
3 intellectual functioning and deficiencies in adaptive behavior in the categories enumerated
4 above. The evidence must also establish that the intellectual and behavioral deficits
5 manifested prior to the age of 18.” Id. at 48.

6 In the first state habeas petition, Petitioner did not assert that he was intellectually
7 disabled. Instead, he argued that “[w]hether or not Mr. Hoyos is mentally retarded, he
8 suffers from moderate to severe brain damage,” and that “[a]side from the question of
9 whether or not Mr. Hoyos is retarded, the reasoning and logic of *Atkins v. Virginia* (2002)
10 536 U.S. 304, applies to Mr. Hoyos, whose mental disorders render him volitionally
11 incapacitated. When the U.S. Supreme Court concluded that mentally retarded murderers
12 are categorically so lacking in moral blameworthiness as to be ineligible for the death
13 penalty, its rationale for doing so compels the conclusion that the volitionally incapacitated
14 are likewise ineligible.” (Lodgment No. 106 at 205) (footnote omitted.)

15 Petitioner provided the California Supreme Court with the evaluation of clinical
16 psychologist Thomas MacSpeiden, Ph.D., who examined Petitioner in 1993 in advance of
17 trial, as well as a declaration from clinical psychologist Ricardo Weinstein, Ph.D., who
18 specializes in neuropsychology and examined Petitioner in 2006. (See Lodgment No. 113,
19 Exs. 93, 99.) However, as discussed below, neither expert offers an opinion that Petitioner
20 is intellectually disabled. Petitioner conceded this point in his state habeas petition,
21 acknowledging in a footnote that whether he was intellectually disabled was “an open
22 question that can only be resolved by further investigation,” citing Dr. Weinstein’s
23 declaration. (Lodgment No. 106 at 205 n. 29.)

24 Dr. MacSpeiden reported that testing showed Petitioner’s Verbal IQ was 79,
25 Performance IQ was 85, and his Full Scale IQ was 79. (Lodgment No. 113, Ex. 93 at 16.)
26 He stated that Petitioner was verbally “borderline,” his motor performance was in the “low
27 average range,” and that overall Petitioner was in the “borderline range,” and that while
28 the tests “were somewhat conservative estimates of his intellectual ability because of

1 cultural factors,” he opined “[i]t is probable that his overall intelligence is in the low
2 average range.” (Id.) Dr. MacSpeiden concluded that: “Jaime Armando Hoyos functions
3 intellectually in the low average range. His verbal IQ tested in the borderline range, but
4 his poor verbal aptitude appeared secondary to the cultural bias of the intelligence test.”
5 (Id. at 22.) Dr. MacSpeiden’s evaluation does not contain any discussion on or offer any
6 opinion as to whether Petitioner is intellectually disabled.

7 Meanwhile, as a result of the 2006 testing, Dr. Weinstein concluded that “Mr. Hoyos
8 is functioning at the mental retardation level of intelligence.” (Lodgment No. 113, Ex. 99
9 at 3.) Dr. Weinstein reported that Petitioner’s verbal IQ was 73, Performance IQ was 75,
10 and Full Scale IQ was 72. (Id.) Dr. Weinstein also noted Petitioner’s “history of multiple
11 brain insults dating back to his childhood” as well as during both Petitioner’s
12 developmental ages and adulthood, in addition to “many instances of loss of
13 consciousness,” and “a long history of severe drug addiction.” (Id.) Dr. Weinstein faulted
14 Dr. MacSpeiden for failing to note that history, as well as for using an interpreter instead
15 of suggesting that the tests should have been conducted by an expert fluent in Spanish. (Id.
16 at 3-4.) Dr. Weinstein stated that: “It is my opinion with a high degree of scientific
17 certainty that Mr. Hoyos suffers from significant brain dysfunction and possibly from
18 mental retardation.” (Id. at 4.) However, Dr. Weinstein further qualified his conclusion
19 that Petitioner “possibly” suffers from an intellectual disability, explaining that:

20 The IQ scores obtained from the instruments utilized indicate that Mr. Hoyos
21 falls within the range of mental retardation (approximately 2 standard
22 deviations below the mean). There are also significant suggestions of
23 adaptive deficits in Mr. Hoyos’s background. Although his ability for
24 thinking abstractly and rationally is severely limited, as is typical in mentally
25 retarded individuals, the diagnosis of mental retardation can not be confirmed
26 without further work and investigation, since many of the potential causes of
his current low intellectual functioning may have occurred after the age of 18.
All currently operative definitions of mental retardation require that the
limitations have originated and manifested prior to the age of 18 years old.

27 (Id.)

28 ///

1 At oral arguments, Petitioner alleged that the California Supreme Court should have
2 issued an order to show cause on the evidence presented, namely the MacSpeiden and
3 Weinstein declarations. (ECF No. 142 (“Oral Arg. RT”) at 77-78.) Respondent maintained
4 that all three criteria (significantly subaverage intellectual functioning, adaptive deficits,
5 and onset prior to age 18) needed to be met to satisfy Cal. Penal Code § 1376, and Petitioner
6 did not do so, as Dr. Weinstein stated he could not confirm Petitioner’s limitations
7 manifested prior to age 18. (*Id.* at 79-80.) Respondent stated that “the burden to show that
8 he met Atkins or met California Penal Code 1376 was not met on habeas corpus in the
9 California Supreme Court, and this Court should defer to that finding.” (*Id.* at 80.)

10 Petitioner asserted that with respect to the state court proceedings, “[c]ounsel took
11 their best shot with the resources that they had, but they exhausted the financial resources
12 provided by the California Supreme Court, applied for additional funding to conduct more
13 investigation, and were denied. So that - - so to the extent that counsel is saying that the
14 Weinstein declaration and the MacSpeiden declaration don’t get the ball all the way down
15 the field into the touchdown zone of a *prima facie* case, that’s not attributable to defective
16 - - or inadequate performance on the part of state post-conviction counsel. That’s equally
17 attributable to the California Supreme Court not providing resources for further
18 investigation that they - - that they requested and were denied.” (*Id.* at 82-83.)

19 Petitioner’s filing subsequent to oral arguments supports his contention that state
20 habeas counsel requested such funding, which the state supreme court denied. (See ECF
21 No. 140.) In September 2007, during state habeas proceedings, counsel for Petitioner
22 submitted a confidential application for additional habeas corpus investigation funds,
23 explained that the standard \$25,000 permitted for investigation and expert services was
24 “inadequate” and requested supplemental funding for additional investigation, including
25 an additional \$7,430 for investigation related to a “Potential Retardation analysis.” (ECF
26 No. 140-1 at 2-3, 12.) Counsel acknowledged the lack of a diagnosis by Dr. Weinstein and
27 stated that: “According to Dr. Weinstein, a definitive diagnosis would require three days
28 in and around Tecate, California, the town where petitioner grew up and where his family

1 remains; two days in San Quentin, to review his medical files and talk with people who
2 have know [sic] him since his arrival at San Quentin in 1994, and one day at La Mesa, the
3 Baja California prison in which he was incarcerated for approximately eight years,” and
4 requested funding for this purpose. (Id. at 10-12) (footnote omitted). In October 2007, the
5 California Supreme Court denied the request. (ECF No. 140-2 at 1.)

6 In his response to Petitioner’s filing, Respondent asserted that the California
7 Supreme Court followed its own rules in denying funding, as state habeas counsel had
8 already exhausted the \$25,000 granted for habeas investigation before requesting
9 additional investigative funding. (ECF No. 141 at 2.) Respondent notes that the state
10 court’s own order denying funding cited “Supreme Ct. Policies Regarding Cases Arising
11 from Judgments of Death, Policy 3, Compensation stds., std. 2-2.1,” which states in
12 relevant part that the court “will not authorize counsel to expend, nor will it reimburse
13 counsel, for habeas corpus investigation exceeding \$25,000 before the issuance of an order
14 to show cause.” (Id. at 2-3, quoting Sup. Ct. Policy 3, std. 2-2.1.) Respondent argues that
15 Petitioner’s failure to state a *prima facie* case and the state court’s denial of an OSC “readily
16 explains” this denial of additional funding. (Id. at 4.)

17 At oral arguments, Petitioner asserted that the state court’s rejection of this claim
18 without issuing an OSC was unreasonable, and also argued that any pleading deficiencies
19 in state court were at least partially attributable to the state court’s denial of supplemental
20 investigative funds. (Oral Arg. RT at 77-78, 82-83.) In light of the recent submission, it
21 is clear that state habeas counsel sought additional funding to complete the investigation
22 and attempt to reach a definitive diagnosis on whether Petitioner was intellectually
23 disabled, and that the California Supreme Court denied the request for supplemental
24 funding.

25 The Ninth Circuit has stated that “a federal court may not second-guess a state
26 court’s fact-finding process unless, after review of the state-court record, it determines that
27 the state court was not merely wrong, but actually unreasonable.” Taylor v. Maddox, 366
28 F.3d 992, 999 (9th Cir. 2004). The Ninth Circuit also cautioned that a reviewing court

1 “must be particularly deferential to our state court colleagues” and instructed that “before
2 we can determine that the state-court factfinding process is defective in some material way,
3 or perhaps non-existent, we must more than merely doubt whether the process operated
4 properly. Rather, we must be satisfied that any appellate court to whom the defect is
5 pointed out would be unreasonable in holding that the state court’s fact-finding process
6 was adequate.” Taylor, 366 F.3d at 1000.

7 Yet, Petitioner fails to show that the state court acted unreasonably in failing to issue
8 an OSC on his Atkins claim. The California Supreme Court has outlined the procedures
9 for considering a habeas petition, stating in relevant part that: “An appellate court receiving
10 such a petition evaluates it by asking whether, assuming the petition’s factual allegations
11 are true, the petitioner would be entitled to relief. If no prima facie case for relief is stated,
12 the court will summarily deny the petition. If, however, the court finds the factual
13 allegations, taken as true, establish a prima facie case for relief, the court will issue an
14 OSC.” People v. Duvall, 9 Cal. 4th 464, 474-75 (1995) (in bank) (internal and external
15 citations omitted). The Duvall Court also stated that: “Issuance of an OSC signifies the
16 court’s preliminary determination that the petitioner has pleaded sufficient facts that, if
17 true, would entitle him to relief.” Id. at 475.

18 Here, because the California Supreme Court issued a summary denial of Petitioner’s
19 Atkins claim, it is presumed that the state court concluded Petitioner’s allegations failed to
20 state a prima facie case for relief. See Duvall, 9 Cal. 4th at 474-75; see also Pinholster 563
21 U.S. at 188, n.12 (“Under California law, the California Supreme Court’s summary denial
22 of a habeas petition on the merits reflects that court’s determination that ‘the claims made
23 in th[e] petition do not state a prima facie case entitling the petitioner to relief.’ In re Clark,
24 5 Cal. 4th 750, 770, 21 Cal.Rptr.2d 509, 855 P.2d 729, 741-41 (1993).”)

25 Reviewing Petitioner’s claim in light of state law concerning claims of intellectual
26 disability and California’s procedures for considering a habeas petition, the state court’s
27 conclusion was not unreasonable. Again, under California law, in order to state a claim of
28 intellectual disability in state post-conviction proceedings, the habeas petition must be

1 accompanied by ““a declaration by a qualified expert stating his or her opinion that the
2 (petitioner) is mentally retarded” See Hawthorne, 35 Cal. 4th at 47, quoting Cal.
3 Penal Code § 1376(b)(1). Specifically, “the expert’s declaration must set forth a factual
4 basis for finding the petitioner has significantly subaverage intellectual functioning and
5 deficiencies in adaptive behavior in the categories enumerated above. The evidence must
6 also establish that the intellectual and behavioral deficits manifested prior to the age of 18.”
7 Id. at 48.

8 Even taking all of Petitioner’s factual allegations, including those in the MacSpeiden
9 and Weinstein declarations, to be true, it is evident that Petitioner did not state a prima
10 facie case for relief, as neither expert stated an opinion that Petitioner was intellectually
11 disabled. Dr. Weinstein indicated he could only state that Petitioner “possibly” met the
12 definition. (Lodgment No. 113, Ex. 99 at 3-4.) Dr. MacSpeiden’s declaration, meanwhile,
13 did not offer an opinion that Petitioner was intellectually disabled or even any discussion
14 of that topic. (See Lodgment No. 113, Ex. 93 at 16.) Given the clear lack of an expert
15 declaration stating an opinion that Petitioner was intellectually disabled, particularly the
16 lack of any showing that Petitioner’s asserted deficits occurred prior to age 18, it is clear
17 that the state court’s rejection of Petitioner’s Atkins claim was not erroneous, much less
18 unreasonable.

19 Nor can the Court conclude that the state court fact-finding process was defective.
20 The record reflects that the state court allocated \$25,000 in investigative funds for
21 Petitioner’s habeas proceedings, and Petitioner exhausted that funding. The state supreme
22 court’s own policies specified that investigative expenses exceeding that amount were not
23 allowed prior to the issuance of an OSC. See Supreme Court Policies Regarding Cases
24 Arising From Judgments of Death, Policy 3, std. 2-2.1 (providing in relevant part that “The
25 court will reimburse counsel for expenses up to \$25,000 that were reasonably incurred
26 pursuant to the duty to investigate as described in standard 1-1, but it will not authorize
27 counsel to expend, nor will it reimburse counsel for, habeas corpus investigation expenses
28 exceeding \$25,000 before the issuance of an order to show cause.”)

1 As Respondent correctly notes, the California Supreme Court followed, and cited to,
2 its own policy in denying Petitioner's supplemental request. In light of California law on
3 the requirements for stating a *prima facie* case for relief on a claim of intellectual disability,
4 Petitioner's failure to satisfy that standard, and the state supreme court's own rules, the
5 rejection of supplemental funding was reasonable and not indicative of a "deficient" or
6 "non-existent" state court fact-finding process. See Taylor, 366 F.3d at 1000. The state
7 court authorized investigative funds during Petitioner's habeas proceedings, which were
8 used in part to retain Dr. Weinstein to test and evaluate Petitioner, and state habeas counsel
9 presumably made decisions concerning the best use of those investigative funds. Petitioner
10 has not offered any indication that had those funds been used differently, or had the state
11 court authorized additional funding even prior to the issuance of an OSC, Petitioner could
12 have stated a claim for relief. As such, the inability to plead a successful claim does not
13 appear readily attributable to inadequacies in the state court process. Petitioner fails to
14 provide evidence supporting a conclusion that he actually meets the definition of
15 intellectual disability. Even taking his factual allegations to be true, the strongest support
16 is Dr. Weinstein's assertion that Petitioner "suffers from significant brain dysfunction and
17 possibly from mental retardation." (Lodgment No. 113, Ex. 99 at 4.)

18 Had the state court provided for further investigation and development of this claim,
19 the Court acknowledges a possibility Petitioner could have obtained and provided evidence
20 showing an onset prior to age 18. At the same time, however, the Court must recognize
21 that further investigation could have instead revealed the onset of Petitioner's condition
22 occurred after 18. Again, Petitioner himself acknowledged during state habeas proceedings
23 that the issue of whether he was intellectually disabled was "an open question that can only
24 be resolved by further investigation." (Lodgment No. 106 at n. 29.) Dr. Weinstein's
25 evaluation and declaration also clearly allowed for either outcome, as he indicated only
26 that Petitioner "possibly" suffered from intellectual disability. While Dr. Weinstein
27 appeared to clearly find that Petitioner met the first criteria, stating that Petitioner
28 functioned at a significantly subaverage intelligence level, the expert was much less firm

1 concerning the second criteria, indicating only that there were “significant suggestions of
2 adaptive deficits” in Petitioner’s history. (Lodgment No. 113, Ex. 99 at 4) (emphasis
3 added.) Finally, Dr. Weinstein cited an inability to reach any conclusion on the third
4 criteria, or to actually confirm a diagnosis, as he could not determine whether the onset was
5 prior to 18, and indeed explicitly conceded that “many of the potential causes of his current
6 low intellectual functioning may have occurred after the age of 18.” (Id.) It is also notable
7 that Dr. MacSpeiden, who examined Petitioner in 1993 prior to trial, found Petitioner’s
8 intelligence to be “low average,” which is clearly contrary to Dr. Weinstein, who in 2006
9 found Petitioner to be “functioning at the mental retardation level of intelligence.”
10 (Compare Lodgment No. 113, Exs. 93 (MacSpeiden) and 99 (Weinstein).)

11 “Atkins stated in clear terms that ‘we leave to the State(s) the task of developing
12 appropriate ways to enforce the constitutional restriction upon (their) execution of
13 sentences.’” Schriro v. Smith, 546 U.S. 6, 7 (2005) (per curiam), quoting Atkins, 536 U.S.
14 at 317 and Ford v. Wainwright, 477 U.S. 399, 416-17 (1986). Petitioner failed to
15 demonstrate, as required by California law to state a claim for relief, that he suffered from
16 “significantly subaverage intellectual functioning and deficiencies in adaptive behavior”
17 and “that the intellectual and behavioral deficits manifested prior to the age of 18.”
18 Hawthorne, 35 Cal. 4th at 47-48. Accordingly, the Court cannot conclude that the
19 California Supreme Court’s rejection of this claim without providing for additional
20 investigation was in error, much less that it was objectively unreasonable so as to merit
21 relief under AEDPA.

22 Ultimately, Petitioner fails to show that the California Supreme Court’s rejection of
23 this claim was either contrary to, or an unreasonable application of, Atkins, or that the
24 California Supreme Court’s conclusion was based on an unreasonable determination of the
25 facts. As such, neither habeas relief nor an evidentiary hearing is warranted on Petitioner’s
26 Atkins claim. See Sully, 725 F.3d at 1075.

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1 3. Claim 26

2 Petitioner asserts that his death sentence “not only violates the Eighth Amendment
3 of the United States Constitution as construed in Atkins, but also the various sources of
4 international law bearing on this issue, including Article 53 of the Vienna Convention.”
5 (SAP at 168-69.)

6 Petitioner raised this claim as Claim XV in the first state habeas petition, and the
7 California Supreme Court rejected it on the merits without a statement of reasoning. (See
8 Lodgment Nos. 106, 118.)

9 Petitioner fails to offer any support for his contention that the international
10 agreements and statements discussed in the state habeas petition are enforceable on federal
11 habeas review, nor does he cite to any clearly established federal law that supports his
12 claim of constitutional error. In the absence of any controlling authority supporting this
13 argument, Petitioner has not shown that the state supreme court’s rejection of this claim
14 was objectively unreasonable. Habeas relief is not warranted on Claim 26.

15 4. Claim 27

16 Petitioner contends that “capital sentencing in California is overall deficient because
17 of the disparate practices in the 58 separate counties” and that “[t]he result is akin to
18 discrimination on the basis of geographic coincidence,” in violation of the Fifth, Sixth,
19 Eighth and Fourteenth Amendments. (SAP at 169.) He also asserts that “[t]here is
20 substantial equal protection law that when fundamental rights are at stake, uniformity of
21 procedures among counties within the state is essential. Bush v. Gore, 531 U.S. 98 (2000).”
22 (Id.)

23 Petitioner raised this claim as Claim XVII in the first state habeas petition, and the
24 California Supreme Court rejected it on the merits without a statement of reasoning. (See
25 Lodgment Nos. 106, 118.)

26 Petitioner’s reliance upon Bush v. Gore is misplaced, as that decision involved legal
27 challenges arising from the 2000 presidential election, and the Supreme Court specifically
28 stated in that case that “[o]ur consideration is limited to the present circumstances, for the

1 problem of equal protection in *election processes* generally presents many complexities.”
2 Id., 531 U.S. at 109 (emphasis added).

3 As for Petitioner’s general assertion that variances among the California counties in
4 charging, prosecution and sentencing violates constitutional principles, he fails to offer
5 clearly established law supporting his position. Indeed, the Supreme Court has on multiple
6 occasions rejected the contention that prosecutorial discretion in capital charging violates
7 constitutional principles. See e.g. Jurek v. Texas, 428 U.S. 262, 274 (1976); Proffitt v.
8 Florida, 428 U.S. 242, 254 (1976); Gregg v. Georgia, 428 U.S. 153, 199-200 (1976). The
9 California Supreme Court, citing those same holdings, has similarly rejected this argument.
10 See e.g. People v. Williams, 16 Cal. 4th 153, 278 (Cal. 1997), quoting People v. Keenan,
11 46 Cal. 3d 478, 505 (Cal. 1988) (“[P]rosecutorial discretion to select those eligible cases
12 in which the death penalty will actually be sought does not in and of itself evidence an
13 arbitrary and capricious capital punishment system or offend principles of equal protection,
14 due process, or cruel and/or unusual punishment.”), citing Jurek, 428 U.S. at 274, Proffitt,
15 428 U.S. at 254, Gregg, 428 U.S. at 199-200.

16 In light of this authority, Petitioner fails to show that the California Supreme Court’s
17 rejection of this claim was either contrary to, or an unreasonable application of, clearly
18 established federal law. Habeas relief is unavailable on Claim 27.

19 **5. Claim 28**

20 Petitioner alleges that he “was substantially prejudiced at both phases of the trial
21 proceedings because of the combined errors, misconduct, and deficient performance by the
22 trial court, the prosecutor, and defense counsel, rendering this trial fundamentally unfair
23 under the Fifth, Sixth, Eighth, and Fourteenth Amendments.” (SAP at 170.)

24 Petitioner raised this claim on direct appeal, which the California Supreme Court
25 rejected, reasoning as follows:

26 Defendant requests that we consider the cumulative effect of any errors in the
27 pretrial stage, guilt phase, or penalty phase in deciding whether to reverse
28 defendant’s convictions and death sentence. Because we conclude there were
no individual errors of any kind, we reject defendant’s claim that any

1 cumulative effect warrants reversal.

2 Hoyos, 41 Cal. 4th at 927. Petitioner re-raised the claim as Claim XVI of his first state
3 habeas petition, and the California Supreme Court denied the claim on the merits without
4 a statement of reasoning. (Lodgment No. 106, 118.)

5 “The Supreme Court has clearly established that the combined effect of multiple trial
6 court errors violates due process where it renders the resulting criminal trial fundamentally
7 unfair.” Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007), citing Chambers v.
8 Mississippi, 410 U.S. 284, 298, 302-03 (1973). “The cumulative effect of multiple errors
9 can violate due process even where no single error rises to the level of a constitutional
10 violation or would independently warrant reversal.” Parle, 505 F.3d at 927, citing
11 Chambers, 410 U.S. at 290 n.3. Here, Petitioner failed to demonstrate the existence of any
12 error, much less multiple errors that could combine to sustain a claim of cumulative error.²³
13 See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (“Because there is no single
14 constitutional error in this case, there is nothing to accumulate to a level of a constitutional
15 violation.”)

16 Petitioner fails to show that the California Supreme Court’s rejection of this claim
17 was either contrary to, or an unreasonable application of, clearly established federal law,
18 or that it was based on an unreasonable determination of the facts. Habeas relief is not
19 warranted on Claim 28.

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23 In the merits briefing, “Counsel for petitioner request leave to provide additional
24 briefing on the cumulative prejudice argument after this Court rules as to the existence of
25 constitutional errors whose prejudice must be weighed cumulatively.” (Pet. Brief at 54-
26 55.) Because Petitioner fails to show the existence of any single instance of constitutional
27 error, much less multiple instances, Petitioner fails to demonstrate a possibility of
28 cumulative error. Accordingly, the Court finds no need for additional briefing on this
matter.

VI. CERTIFICATE OF APPEALABILITY

In a habeas case, a certificate of appealability [“COA”] may be granted “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A certificate of appealability should issue if ‘reasonable jurists could debate whether’ (1) the district court’s assessment of the claim was debatable or wrong; or (2) the issue presented is ‘adequate to deserve encouragement to proceed further.’” Shoemaker v. Taylor, 730 F.3d 778, 790 (9th Cir. 2013), quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (“Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.”) Meanwhile, the Ninth Circuit has repeatedly characterized the standard required for granting a COA as “relatively low” or “modest.” See e.g. Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002), Silva v. Woodford, 279 F.3d 825, 832 (9th Cir. 2002), quoting Lambright v. Stewart, 220 F.3d 1022, 1024 (9th Cir. 2000). In light of this standard, the Court finds Claims 1, 5, 13, 14, 22, 23, and 25 appropriate for a COA.

VII. CONCLUSION

For the reasons discussed above, the Court **DENIES** Respondent's request to dismiss Claims 14-16 on the basis of state procedural bars, **DENIES** Petitioner's motion for an evidentiary hearing on Claims 13-23 and 25, and **DENIES** Petitioner's request for relief on the merits of all claims in the SAP. In the final order, the Court will **GRANT** a COA on Claims 1, 5, 13, 14, 22, 23, and 25.

IT IS SO ORDERED.

Dated: October 4, 2017

M. James Lorenz
Hon. M. James Lorenz
United States District Judge